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No.

In the Supreme Court of the United States

October Term, 1985

MATRIX ENTERPRISES, INC. and
WILLIAM R. ORMES,
Petitioners,

vs.

MILLINGTON TELEPHONE COMPANY, INC.,
CITY OF MILLINGTON, TENNESSEE,
MILLINGTON CATV, INC., and
WILLIAM S. HOWARD,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LARRY E. PARRISH, ESQ.
(Counsel of Record)
PARRISH & MULROONEY, P.C.
Twenty-First Floor
First Tennessee Building
165 Madison Avenue
Memphis, Tennessee 38103
(901) 526-7777
Attorney for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED FOR REVIEW

1. Has the United States Court of Appeals for the Sixth Circuit, in the substance and manner by which it rendered the decision below, so far departed from the accepted and usual course of judicial proceedings so as to justify a writ of certiorari to correct the abuse?

2. Does the complaint fail to allege two predicate acts necessary to support a civil action under Title 18 *United States Code* §1964(c), even when numerous instances of the use of the mails and interstate wire transmission to further a scheme by the governing officials of a municipality are alleged?

3. Is an affirmative misrepresentation required to be alleged in order to support a civil action under RICO?

4. Can a Court of Appeals dismiss an action based upon statements it says counsel, arguing against the dismissal, made, which a transcript of the remarks made in the oral argument prove indisputably he did not make?

5. Does a complaint that alleges one count of monopoly and nine counts of restraint of trade fail to state a claim for any antitrust violations under §1 and §2 of the Sherman Act even if the Court of Appeals' observation that an essential element to the monopoly count is absent is correct, but there is no such absence of any elements with reference to the restraint of trade counts?

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OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is designated as not for publication, but is included, in its entirety, in the Appendix, at A1. The order denying petitioner's request for a rehearing en banc is contained in the Appendix at A4. The order of the United States District Court For the Western District of Tennessee, Western Division, granting defendants' motions to dismiss is contained in its entirety in the Appendix at A5.[1]

1. The listing of parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of petitioner Matrix Enterprises, Inc., required by Supreme Court Rules, Rule 28.1, was filed with the Court in the form of an affidavit of counsel for petitioners on July 8, 1985.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit sought to be reviewed by this petition for writ of certiorari was made and entered on February 15, 1985. (A1) A petition for rehearing en banc was denied on April 17, 1985. (A4) An order extending time to file petition for writ of certiorari was entered on July 10, 1985, extending the time for filing the petition to and including August 15, 1985. (See Appendix, A44) Jurisdiction is conferred upon this Court under Title 28, *United States Code* §1254(1).

STATUTES, ORDINANCES & REGULATIONS

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other

person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

18 U.S.C. § 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Tennessee Code Annotated

§ **6-2-402. Restrictions on interest of officers.**— (a) No officer in a municipality shall be directly interested in any contract to which the city is a party. "Directly interested" means any contract with the official himself or with any business in which the official is the sole proprietor, a partner, or the person having the controlling interest. "Controlling interest" shall include the individual with the ownership or control of the largest number of outstanding shares owned by any single individual or corporation.

(b) No officer in a municipality shall be indirectly interested in any contract to which the municipality is a party unless the officer publicly acknowledges his interest and recuses himself from any of his duties which include the consideration of, voting on, or overseeing the particular contract. "Indirectly

interested" means any contract in which the officer is interested but not directly so, but includes contracts where the officer is directly interested but is the sole supplier of goods or services in a municipality.

Tennessee Code Annotated

§ 7-59-102. Franchise licenses—Franchises not to be inconsistent with federal communications commission rules and regulations.—(a) The governing body of each municipality in each county in this state shall have the power and authority to regulate the operation of any cable television company which serves customers within its territorial limits by the issuance of franchise licenses after public notice and showing the terms of any proposed franchise agreement and public initiation for fees and not inconsistent with any rules and regulations of the federal communications commission.

FCC Rules, 47 C.F.R. § 63.55

§ 63.55 Affiliation showings

Except as provided for in Section 63.56, applications by telephone common carriers for authority to construct and/or operate distribution facilities for channel service to cable television systems in their service areas shall include a showing that the applicant is unrelated and unaffiliated, directly or indirectly, with the proposed cable television operator.

STATEMENT OF THE CASE

Respondent, City of Millington, Tennessee (hereinafter "Millington"), a Tennessee municipality, without the public notice and hearing required by state statute [*Tennessee*

Code Annotated §7-59-102(a)], enacted an Ordinance in 1979 by which Millington obligated itself to issue a cable television franchise to respondent, Millington Telephone Company (hereinafter "Millington Telephone"), which is owned by respondent, William S. Howard (hereinafter "Howard"), who was then, and continued thereafter to be, an elected member of the governing body of Millington, the Board of Mayor and Aldermen. Millington's Board of Mayor and Aldermen did not solicit bids or entertain unsolicited applications from willing and able applicants for the franchise.

Petitioner, Matrix Enterprises, Inc. (hereinafter "Matrix"), a provider of cable television services, requested an opportunity to apply for the opportunity to enter in a franchise agreement, but Millington refused to consider the request responding that Matrix need not apply because "the franchise" had already been granted.

Matrix filed suit (a copy of the complaint being included in its entirety in the Appendix at A21) in the district court below alleging that the agreement between Millington and Millington Telephone violated §1 and §2 of the Sherman Act (Title 15 *United States Code* §§1 and 2 and Title 18, *United States Code* §1964(c), known by the acronym RICO). The terms of the agreement alleged to be unlawful were that Millington promised to enter into a franchise agreement awarding a cable television franchise to Millington Telephone in violation of *Tennessee Code Annotated* §6-2-402, which prohibits such agreements between a municipality and an entity in which an officer of the entity has an interest, if Millington Telephone was able to overcome its disqualification under the provisions of *Tennessee Code Annotated* §7-59-102(a). Subsequently Millington awarded a franchise agreement to respondent, Millington CATV, Inc. (hereinafter "Millington CATV"),

another company owned by Howard, as the apparent assignee (but in reality merely the designee) of Millington Telephone, but refused to allow Matrix to submit a bid for the franchise. The Complaint specifically pled use of the mails and interstate wire transmissions to further the scheme to defraud. Jurisdiction was based on Title 28, *United States Code* §1331; Title 15, *United States Code* §4; and Title 18, *United States Code* §1964(c). Matrix sought monetary, declaratory and injunctive relief.

Before respondents answered the complaint, the district court granted respondents' motions to dismiss, holding that RICO is restricted for application only to claims against Organized Crime (used as a proper name for some identifiable entity) enterprises and that, as to the *Sherman Act* claims, Millington is exempt from antitrust laws because of the "state action" doctrine and the remaining respondents are shielded from application of the antitrust laws through the *Noerr-Pennington* doctrine to the United States Court of Appeals for the Sixth Circuit (hereinafter "the Sixth Circuit"). Briefs were submitted and oral argument was heard by the Sixth Circuit on January 23, 1985, and on April 25, 1985, the order of dismissal of the district court was affirmed, but on other grounds.

SUMMARY OF RELEVANT FACTUAL ALLEGATIONS

Because the motions to dismiss were granted by the district court before respondents answered, there are no admitted facts of record. However, no recitation of authority is necessary to establish the fundamental premise that, in determining whether a motion to dismiss is meritorious, all of the well pled facts, and all reasonable

inferences from them are to be taken as true and viewed in the light most favorable to the opponent of the motion. Proceeding in this assumption, petitioners will synopsize the facts of most significance in assessing whether a cause of action has been stated.

In 1977, the Tennessee General Assembly enacted a statute addressing the subject of cable television franchising by local governments. This is titled the Cable Television Act and is codified in *Tennessee Code Annotated* §§7-59-101 *et seq.* (hereinafter "the 1977 statute"). This statute stated in its body that it authorized local governments to regulate cable television by issuance of franchise licenses after a public showing of a franchise agreement between the local government and the cable television provider. The 1977 statute maintained the previously existing silence concerning the scope of the regulation which a municipality might impose; however, it did recite essential forms and procedure by which a franchise license is issued after a franchise agreement between the municipality and the cable television provider.

Prior to the enactment of the 1977 statute, Millington had not entered into any franchise agreement with a cable television provider. In 1979, Millington Telephone, owned by Howard appeared before the Board of Mayor and Aldermen to request issuance of a franchise license, which the 1977 statute requires include a franchise agreement between Millington and Millington Telephone, which would permit Millington Telephone to be the cable television provider in the geographical area governed by Millington.

Although no public notice was ever given, the Board of Mayor and Aldermen, with full knowledge that one of its members owned Millington Telephone, enacted Millington Ordinance 1979-8 (hereinafter "the 1979 ordi-

nance") by which Millington agreed that, if Millington Telephone could obtain the necessary permission from the Federal Communications Commission (hereinafter "FCC") to remove its disqualification under the 1977 statute within three (3) years (see FCC Rules 47 C.F.R. §63.55 and §64.602). Millington would issue a franchise license as a result of the franchise agreement which would allow the company one year from that date within which to provide cable television services. The 1979 ordinance spelled out the details of the franchise agreement which Millington agreed to enter with Millington Telephone if it relieved itself of its disqualifications. The specifications of the 1979 ordinance allowed Millington Telephone to engage in profit making from providing cable television services in such a way, as was the intent to effectively protect the product market for Millington Telephone during the time while it sought to meet the requirements of the 1977 statute and the FCC as a franchisee and for thirty-five (35) years beyond. In return, Millington Telephone was to agree to pay three percent (3%) of its profits to Millington for the privilege.

After Millington passed the 1979 ordinance, petitioners, as experienced cable television providers, initiated contact with Millington requesting permission to make application to Millington in an attempt to enter into a franchise agreement with Millington to provide cable television services. Millington and Howard, in cooperation one with the other, repeatedly refused to allow petitioners the opportunity to submit a proposal which Millington would consider. Instead, petitioners were told that "the franchise" had already been awarded.

After petitioners continued to press for the opportunity to compete for the right to provide cable television service in the territory under the jurisdiction of Millington,

the Millington Telephone, after formal and official approval of the Millington Board of Mayor and Aldermen, "assigned" its "franchise license" to Millington CATV, which did not need special permission of the FCC to operate as a cable television provider. Millington CATV was not experienced as a cable television provider. In fact, it was a company newly formed by Howard for no purpose other than to be the "assignee" of Millington Telephone.

ARGUMENT

It is necessary, in order to fully understand the substantive departure by the Sixth Circuit from the earlier declarations of this Court and opinions of other federal courts of appeals, to bring to the attention of this Court the probable consequences if the writ of certiorari requested herein is not granted, and the Sixth Circuit reviewed and reversed. Upon the filing of petitioners' complaint, a motion to dismiss was filed, stating, as grounds for dismissal, failure to state a claim upon which relief can be granted pursuant to *Federal Rules of Civil Procedure,* Rule 12(b)(6). The district court granted that motion on substantive grounds. The district court did not designate that its judgment was without prejudice, notwithstanding the fact that no evidence had yet been presented, and no answer yet filed.

On appeal to the Sixth Circuit, petitioners thoroughly briefed the law dispositive of the issues raised by the erroneous ruling of the district court below on every point of law upon which the judgment below was based. In oral argument before the Sixth Circuit the issue was once again whether, solely on the basis of the allegations made in petitioners' complaint below, petitioners had failed to state a claim upon which relief could be granted.

The Sixth Circuit determined that the dismissal was appropriate. However, the Sixth Circuit noted in its opinion that the dismissal could not be sustained on the substantive grounds serving as the basis for the dismissal by the district court below. Rather, the Sixth Circuit stated technical and procedural grounds rendering the *allegations* defective which had not theretofore been addressed by the district court. Consequently, the petitioners were prohibited from having their day in court, before a jury, on the merits of their case, for failing to meet threshold standards which were not even issues of significance before the Sixth Circuit. Thus, petitioners had no meaningful opportunity to be heard on the dispositive issues of the case and were foreclosed from any right they might have had to move to amend the pleadings in the district court had the issues that determined the outcome of the case been raised as significant in the district court.

Consequences If Certiorari Not Granted

These essential facts are restated here not only for the purpose of appealing to this Court, as the court of last resort, to correct the erroneous ruling of the Sixth Circuit, but also to show to this Court the basis upon which petitioners urge this Court to allow petitioners, even assuming the Sixth Circuit decision is not determined by this Court to be erroneous, to have their day in trial court, before a jury, on the merits of their case.

First, as to the correction of the erroneous ruling of law by the Sixth Circuit, if this Court does not act, petitioners are forced to proceed again in district court below with the probability that an incorrect ruling of law will be binding, should a second appeal to the Sixth Circuit be necessary, by application of the doctrine of "law of the

case." The law of the case doctrine has the effect of precluding the appellate court from rendering a decision contrary to a previously rendered appellate decision in a particular case irrespective of whether the prior unreversed ruling was error or not. *U.S. v. U.S. Smelting, Refining and Mining Co.*, 339 U.S. 187, 70 S.Ct. 537, 94 L.Ed. 750 (1949); *Westbrook v. Zant*, 743 F.2d 764 (11th Cir. 1984). It would be petitioners' position that the law of the case would never apply under the facts of this case since the dismissal was rendered without any evidence, and one of the exceptions to the rule applies when the evidence on a subsequent trial is substantially different from the evidence presented in the first trial. *Zant* (supra). Of course, the law of the case doctrine never precludes a second appeal when the previous decision was clearly erroneous and would work a manifest injustice, as in this case, but, practically speaking, the Sixth Circuit refused the opportunty to review their own appeal on a request for a rehearing en banc where the same standard prevails. Petitioners are faced with the probability that the Sixth Circuit would not change its mind, not only with respect to the issue but with respect to whether a manifest injustice occurred or whether there had been a clearly erroneous ruling. Petitioners are simply at the mercy of this Court to correct the error of the Sixth Circuit, since the Sixth Circuit has already refused to do so itself.

Secondly, a more fundamental obstacle is facing petitioners as they prepare to proceed in district court below. The district court's judgment did not designate whether or not the dismissal was with or without prejudice. (See Appendix, A22) Depending, therefore, on how a *Federal Rules of Civil Procedure,* Rule 41(b), involuntary dismissal, is interpreted to apply in this situation, petitioners, who merely filed a detailed complaint, dismissed on substantive

grounds in the district court, might be precluded from having their day in court on the merits by the omission of the words "without prejudice."

Petitioners had no reason to amend their complaint in the district court, and did not. The district court recognized the sufficiency of the allegations of mail and wire fraud and Sherman Act violations under Sections 1 and 2. (See Order in Appendix, A5, A8, A9) It was only after the appellate decision was rendered that plaintiffs learned that the dismissal was based upon threshold pleading defects, in the eyes of the Sixth Circuit. Consequently, if petitioners are precluded from proceeding in district court, the dismissal of their complaint being viewed, by an improper application of Rule 41(b), as an adjudication on the merits, then petitioners will have been effectively expelled from court on the merits of a case which were never reached. Such a result would be in diametric opposition to the common law principle that no adjudication that is merely based on a defect on the pleadings and does not reach the merits of a case has res judicata effect on a presentation of the case on its merits. *Hughes v. United States,* (U.S.) 4 Wall. 232, 237, 18 L.Ed. 303, 305.

Furthermore, to render as an adjudication on the merits an involuntary dismissal, such as the one in the instant case, is in direct opposition to this Court's pronouncements in *Costello v. United States,* 365 U.S. 265, 5 L.Ed.2d 551, 81 S.Ct. 534 (1961), wherein it was held, in the context of a sua sponte dismissal by the Supreme Court, that when there is such a dismissal for failure of the dismissed party to meet a "precondition requisite" to the court's reaching the merits of the case, the case is dismissed without prejudice, allowing the dismissed party to go forward on the merits, nothwithstanding the absence of a designation of "without prejudice."

For the reasons stated above petitioners call upon this Court to correct the dismissal by the Sixth Circuit by requiring the insertion of the words "without prejudice" in the judgment below, or viewing the judgment below as being without prejudice notwithstanding the absence of the words "without prejudice" consistent with *Costello* and *Hughes,* or allowing petitioners to amend the complaint, if such an amendment is deemed necessary to allow the petitioners to have their day in trial court before a jury on the merits of the case. A denial of certiorari will of necessity be interpreted as a ruling consistent with the previously stated law in *Costello* and *Hughes* that the dismissal in this case is not an adjudication on the merits.

Question One

Regarding the error committed by the Sixth Circuit, it is first necessary, before reaching the conflict with the decisions of this Court and other federal courts of appeals, to present to this Court the manner in which the Sixth Circuit departed from the accepted and usual course of judicial proceedings. See *Supreme Court Rules,* Rule 17.1 (a). The Sixth Circuit has grossly abused its power and the question of naked power has long been settled by this Court. *La Buy v. Howes Leather Company,* 352 U.S. 249, 1 L.Ed.2d 290, 77 S.Ct. 309 (1957). In order to preserve the administration of justice in the Sixth Circuit, this Court must exercise its supervisory powers to rectify the irreparable harm caused by the negligence of the Sixth Circuit.

It is one thing for the Court of Appeals to make an erroneous analysis or statement of the law, as it is understandable that complex issues may be resolved in ways inconsistent with other federal courts of appeals or even

decisions of this Court; this is why a court of last resort is needed, i.e., to resolve disputes remaining after an appeal so that uniformity may exist among the circuits and that this Court's decisions may be upheld as the supreme law of the land among all the circuits. On the other hand, it is quite another thing, and inexcusable, for a Court of Appeals to do what it did in this case when it failed to meet minimum fundamental requirements imposed on a judicial tribunal before the substantive issues of law are even reached.

Either the Sixth Circuit did not read the complaint or is trying to mislead for the purpose of attempting to make final a ruling with no substantiation in law or fact. Whichever the Sixth Circuit did, the result is the same, and must be corrected. In an attempt to give the Sixth Circuit the benefit of the doubt, it will be assumed that the Sixth Circuit merely failed to read the complaint.

Question Two

The Sixth Circuit stated that the petitioners failed to allege in their complaint two predicate acts necessary to support a civil action under 18 *United States Code* §1964(c). Unquestionably, in ¶63 and ¶65, the complaint incorporates all previously made allegations in the complaint. Unquestionably, the complaint explicitly alleges in ¶33 that Ormes sent a letter on June 10, 1980; in ¶37 Ormes sent a letter to named respondents on March 10, 1981; and in ¶38 a named respondent sent a letter on March 13, 1981.

Additionally, ¶64 and ¶66 contain the following identical language relative to the conduct:

> "From . . . April 2, 1979, . . . unlawfully did conduct and participate in the conduct of the affairs of the

> aforesaid enterprises through . . . use of the mails . . . and . . . interstate wire transmissions in furtherance of a scheme which included defrauding . . . . In furtherance of said scheme, Howard used the . . . mails and interstate wire transmissions on more than two occasions within a period between April 2, 1979 and March 13, 1981 thus consisting a pattern of activity as . . . defined in Title 18, *United States Code* §1961(5).

It is also without question that Title 18, *United States Code* §1341 prohibits both the sending *and the receipt* of mail matter as a part of that which is proscribed. There is additional conduct alleged which would naturally lead one to, applying common sense, assume included or contemplated use of the mails. Further, ultimate success of the alleged scheme contemplated a continuation of illicit conduct for at least 35 years with one of the respondents operating as a franchisee of a cable television company serving a potential market of 6800 households. To assume that such a business might continue without use of the mails is unrealistic. Pertinent are the following words in *Pereira v. United States*, 347 U.S. 1 (1954) at 8-9:

> It is not necessary that the scheme contemplate the use of the mails as an essential element . . . for when one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used.

Thus, not only does the Sixth Circuit fail to read the complaint, its opinion conflicts with the decisions of this Court regarding the allegation of mail fraud and wire fraud, and this serves as another basis for review by this Court.

Question Three

The Sixth Circuit referring to *Federal Rules of Civil Procedure,* Rule 9(b), stated that Matrix and Ormes failed to "properly allege fraud." Of course, the opinion gives no direction to Matrix and Ormes as to how they fail to plead fraud with particularity, and how the complaint does not comply with interpretations of *Federal Rules of Civil Procedure,* Rule 9(b), so that petitioners may now know how to rephrase or supplement their allegations in order to comply with those rules. It is the position of Matrix and Ormes that they have complied with the requirements of particularity found in Rule 9(b), and that it is only by reference to the only case cited, and not explained, by the Sixth Circuit that the reasoning of the panel might be discerned.

The Seventh Circuit, in *Haroco v. American National Bank and Trust Company of Chicago,* 747 F.2d 384 (7th Cir. 1984), *aff'd per curiam,* 53 U.S.L.W. 5067 (U.S. July 1, 1985), strongly affirmed by this Court, set out the applicable standard of particularity under *Federal Rules of Civil Procedure,* Rule 9(b), when it stated as follows at 404:

> To establish its case at trial a civil plaintiff must surely prove the acts of racketeering, but the district courts in *Bache, Halsey* and *Taylor* appear to have moved that requirement up to the pleading stage. For several reasons, we do not agree that such specificity is required *at the pleading stage.*
>
> . . .
>
> We see no grounds for demanding that a civil RICO plaintiff essentially plead evidence and prove the case in the complaint.

The Seventh Circuit further stated as follows at 405:

> There can be little doubt that *Federal Rules of Civil Procedure* 9(b), which requires that allegations of fraud specify "with particularity" the circumstances of the alleged fraud, applies to fraud allegations and civil RICO complaints. *See Moss v. Morgan Stanley, Inc.* (supra) 719 F.2d at 19. In this case the complaint adequately specified the transactions, the content of the allegedly false representations, and the identities of those involved. In addition, the identification of the transactions and the description of the alleged scheme to defraud *put defendants on fair notice* of the time and place of the alleged false representations. (Emphasis added) (Cites omitted)

Thus, the complaint in this case, having very adequately specified the transaction, the content of the fraud constituting wire fraud and mail fraud, and the identities of those involved, in addition to the identification of transactions and a description of the alleged scheme to defraud, put respondents on fair notice of the time and place of the fraud so that *Federal Rules of Civil Procedure*, Rule 9(b) has been met.

Apparently, the Sixth Circuit by citing *DeCarlo, et al. v. Southland Corporation* (slip opinion No. 83-1525, 6th Cir. 1984), intended their rejection of petitioners' complaint to be one on the substantive requirements of *DeCarlo*, which petitioners contend is also an erroneous statement of the law when measured against this Court's previous declarations. The *DeCarlo* decision comes very close to superimposing a common law fraud standard on the mail fraud statute in direct violation of *Durland v. United States*, 161 U.S. 306, 312-313 (1896), when it requires an "active misrepresentation" in order to state a claim for mail fraud.

The complaint in this case does not allege what is sometimes classified as an "active misrepresentation." Rather, it is the *inherent misrepresentation* implied in every breach of trust. It cannot be said any better than petitioners stated it in Appellants' Petition For Rehearing With A Suggestion For Rehearing En Banc as follows, at page 9:

> Every person standing in a position of trust impliedly represents, during the tenure of the office, that every act done will be done without breach of the trust. As soon as the trust is breached, a misrepresentation occurs. For instance, it would be impossible for public officials to be involved in a conflict-of-interest, as alleged, without breaching the public trust and being guilty of an inherent misrepresentation. To the extent that misrepresentation is necessary at all, this inherent misrepresentation, even if all the facts were known to all the interest parties [*Epstein v. United States*, 174 F.2d 754, 768 (6th Cir. 1949)] would support a conviction for mail fraud. The "inherent misrepresentation" v. "active misrepresentation" distinction is one of extreme import. If, and to the extent, the law requires an active misrepresentation, Matrix and Ormes concede the inadequacy of the complaint allegations concerning RICO.
>
> It is the position of Matrix and Ormes that the panel opinion departs from existing authority in this circuit as well as, the rule prevailing in other circuits in two major respects . . . . The prevailing rule, narrowed to the precise point at issue here, concerning §1341, is succinctly stated in *Deaver v. United States*, 155 F.2d 740, 744 (D.C. Cir. 1947), as follows: "[B]road in scope and not limited by the common law rules . . . ." and that the scheme interdicted "[M]ay be fraudulent though no misrepresentation is made."

Even the dissenters in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 53 U.S.L.W. 5034 (U.S. July 1, 1985), *rev'd and rem'd*, 741 F.2d 482 (2d Cir. 1984), recognized the breadth of mail fraud in not requiring an active misrepresentation when it stated as follows at slip opinion page 3:

> Under the Court's opinion today, two fraudulent mailings or use of the wires occurring within ten years of each other might constitute a "pattern of racketeering activity," §1961(5), leading to civil RICO liability. See §1964(c). The effects of making a mere two instances of mail or wire fraud potentially actionable under civil RICO are staggering, because in recent years the Courts of Appeals have "tolerated an extraordinary expansion of mail and wire fraud statutes to permit federal prosecution for conduct that some had thought was subject only to state criminal and civil law.
>
> . . .
>
> Courts have sanctioned prosecutions based on deprivations of such intangible rights as a shareholder right to "material" information, *United States v. Siegal*, 717 F.2d 9, 14-16 (CA2 1983); a client's right to the "undivided loyalty" of his attorney, *United States v. Bronston*, 658 F.2d 920, 927 (CA2 1981), cert. denied, 456 U.S. 915 (1982); an employer's right to the honest and faithful service of his employees, *United States v. Bohonus*, 628 F.2d 1167, 1172 (CA9), cert. denied, 447 U.S. 928 (1980); and a citizen's right to know the nature of agreements entered into by the leaders of political parties, *United States v. Margiotta*, 688 F.2d 108, 123-125 (CA2 1982), cert. denied, 461 U.S. 913 (1983).

Question Four

With respect to the antitrust allegations, the panel opinion summarily disposed of not only the one monopolization count under §2 of the Sherman Act, but nine restraint of trade counts under §1 of the Sherman Act by the following language in the slip opinion at 3:

> With respect to plaintiffs' antitrust theory of legal liability, we have taken note of the fact that in oral argument presented to the court, the plaintiffs' attorney *acknowledged* that the cable TV franchise in question is a non-exclusive franchise. Therefore, as such does not involve a monopoly, no antitrust violation can be stated upon which relief can be granted. (Emphasis added)

By this statement, the Sixth Circuit panel evidences either a total lack of understanding of basic antitrust law, or, more importantly, a total disregard for the rights of petitioners caught in the net of abusive and fraudulent governmental authority, since it is explicitly clear in everything that the petitioner has written or stated orally, before the court below, that what the panel opinion states counsel "acknowledged" was absolutely contrary to everything that counsel, or petitioners themselves, have ever said. The statement made by the panel opinion is simply false.

Counsel's arguments were consistent with the position of petitioners in the complaint allegation that the document, which adversary counsel *argued* was a franchise, stated of itself that it was "non-exclusive," but counsel in no way abandoned the complaint allegation that the document in question was not a franchise, and certainly in no way acknowledged that the document was a non-exclusive franchise, as is most clearly indicated from the only

exchange between counsel and the panel, as transcribed from the panel's own recording as follows:

> JUDGE KENNEDY: Counsel, let me ask you, I recognize that we don't have before us the ordinance, but it was your complaint that leads—seems to indicate—it was an exclusive ordinance—exclusive franchise, I mean.
>
> PARRISH: The complaint is *that it was exclusive.* (Emphasis added)
>
> JUDGE KENNEDY: Well, do you—
>
> PARRISH: The fact that the—
>
> JUDGE KENNEDY: She's saying you don't allege that one way or another.
>
> PARRISH: I leave that open because it is a fact for determination. That is, whether it is exclusive or not —irrespective of what language might be used in the ordinance itself—
>
> JUDGE KENNEDY: Well, how could it be? Now that I can't—
>
> PARRISH: Well. The ordinance uses sham language, and it'll be up to the marketplace for people in competition in the, ah, product market in the geographical area. But, I would, suggest, as a matter of fact, I may not—I'm saying that I—
>
> JUDGE KENNEDY: You don't know what the ordinance says?
>
> PARRISH: I know the ordinance says non-exclusive. But, I know that—I think that is still a matter of fact. I'm—whether to pursue it or not to pursue it or—ah, ah—just the wording of a contract does not make the contract a restraint of trade or not a restraint of trade.

> It depends on the facts and the context and the application of the contract. And, I didn't specifically allege—because, I'll—that's an option I think that's left open to factual determination. Whether it will be wise to do it or not, I don't know. It's a decision not made yet. We are just getting to the point where we have to make it.

Obviously, counsel for petitioners did not acknowledge anything other than the fact that the municipal ordinance purporting to establish the franchise contract between Millington and Millington Telephone said "non-exclusive." In fact, to the extent that anything that counsel might say in oral argument might be construed as evidence upon which a dismissal might be based, counsel specifically stated that the complaint is that it was exclusive. There could be no better or effective way to monopolize or restrain trade by a governmental authority than to enact an ordinance with sham language regarding the non-exclusivity of a franchise, when the agreement, in reality, is a monopolization and a restraint of trade, which is exactly what petitioners contend in their complaint.

Question Five

What is even more perplexing is that the panel decision seems to assume that the only allegation of an antitrust violation is monopolization. As indicated previously, only one of the ten antitrust allegations was made pursuant to §2 (monopoly) of the Sherman Act, Title 15, *United States Code,* and nine separate allegations were made under §1 (restraint of trade). Even if counsel had acknowledged that the franchise was non-exclusive, and even if counsel's acknowledgement could be viewed as evidence justifying a dismissal thereon, and even if the single monopoly count is thereby excised from the com-

plaint, the nine separate restraint of trade counts, having absolutely nothing to do with monopoly, cannot be dismissed thereby. Petitioners submit that the only way such can occur is by a gross error by the Sixth Circuit.

SUMMARY OF ARGUMENT AND CONCLUSION

In summary, petitioners contend that the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings that only a grant of this petition for a writ of certiorari will correct the abuse of naked power, and send a message to the Sixth Circuit that the disdain of the panel for civil RICO will not be tolerated as an excuse to trample roughshod over minimal standards of basic fairness in judicial proceedings. The issues raised in this petition for certiorari are extremely important questions of federal law which must be settled and clarified once and for all by this Court. The statements of this Court regarding the breadth of mail fraud and wire fraud may only be preserved by a strong statement by this Court, once again, in order to stop the Courts of Appeals from doing indirectly what this Court's pronouncements in *Sedima*, supra, prevent them from doing directly, that is, very narrowly restricting the predicate offenses of RICO, thus rendering void the provisions of RICO, and mail fraud and wire fraud as predicate offenses thereof.

Petitioners pleadingly urge this Court to correct the Sixth Circuit's backhanded attempt to place glosses on the requirements of mail fraud and wire fraud, by requiring affirmative misrepresentations, directly in conflict with this Court's pronouncements in *Durland v. United States*, supra, and in *United States v. Maze*, 414 U.S. 395 (1974); in conflict with the Sixth Circuit's own decisions in *Epstein*

v. United States, 174 F.2d 754, 768 (6th Cir. 1949), and *United States v. Schilling,* 561 F.2d 659, 662 (6th Cir. 1977); and in conflict with the decisions of other federal courts of appeal. *Deaver v. United States,* 155 F.2d 740, 744 (D.C. Cir. 1947); *United States v. Frankel,* 721 F.2d 917 (3rd Cir. 1983); *United States v. Clapps,* 732 F.2d 1148 (3rd Cir. 1984); *United States v. Mandel,* 591 F.2d 1347 (4th Cir. 1979); and *United States v. George,* 477 F.2d 508, 515 (7th Cir. 1973).

Petitioners further urge this Court to review and reverse the decision of the Sixth Circuit dismissing petitioners' complaint for failure to allege two predicate offenses in conflict with the requirements for pleading as stated by this Court in *Pereira v. United States,* 347 U.S. 1 (1954) and other federal courts of appeals such as *Bosse v. Crowell Collier & MacMillan,* 565 F.2d 602 (9th Cir. 1977); *United States v. Schilling,* supra; *Massey-Ferguson, Inc. v. Bent Equipment Company,* 283 F.2d 12 (5th Cir. 1960) at 15; and *Haroco, Inc. v. American National Bank and Trust Company of Chicago,* 747 F.2d 384 (7th Cir. 1984), *aff'd per curiam,* 53 U.S.L.W. 5067 (U.S. July 1, 1985).

The type of trust most revered and sacrosanct in the law is the public trust binding public officials. To breach that trust is the worst kind of fraud and is a common type of mail fraud, a point well made in *United States v. Mandel,* supra at 1362. To allow this type of activity to go on in Millington, Tennessee, alleged in the complaint in this case and to allow it to be approved by the federal district court and the Sixth Circuit, not only shakes the faith of the local constituency, and the petitioners herein, in the integrity of government, or in the accountability to the standards of integrity imposed, but, more importantly, destroys the faith of petitioners in the public trust held

by the members of the judiciary to impose those standards of accountability and effectively administer justice. The implications and ramifications of the Sixth Circuit's opinion in this regard are broad in scope; however, they will be experienced, though not perceived consciously by the public, from behind the back, so to speak, due to the fact that the opinion of the Sixth Circuit is not for publication, and its import not obvious on its face. Petitioners believe that this Court will discern the import of what the Sixth Circuit has said, has not said, and what it has done. Only this Court can preserve the public's trust in its officials charged with the highest standards of integrity, and only this Court can correct the error of the Sixth Circuit in order to preserve the effective and honest administration of justice in this country.

Respectfully submitted,

PARRISH & MULROONEY, P.C.
By: LARRY E. PARRISH

APPENDIX

(Filed February 15, 1985)

NOT FOR PUBLICATION

No. 84-5097

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MATRIX ENTERPRISES, INC.
and WILLIAM R. ORMES,
Plaintiffs-Appellants,

v.

MILLINGTON TELEPHONE COMPANY, INC.; CITY OF MILLINGTON, TENNESSEE; MILLINGTON CATV, INC., and WILLIAM S. HOWARD,
Defendants-Appellees.

On Appeal From the United States District Court for the Western District of Tennessee

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BEFORE: KENNEDY, CONTIE and MILBURN, Circuit Judges

Per Curiam. This is a private treble damage action alleging violations of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. Sections 1 and 2), a violation of the Racketeer Influenced and Corrupt Organizations Act

("RICO"), 18 U.S.C. Sections 1961 *et seq.*, and also seeking a declaratory judgment as to the meaning of a Tennessee statute (T.C.A. Section 6-2-402) under the district court's pendent jurisdiction. Plaintiffs-appellants appeal from a judgment of the district court dismissing their complaint for failure to state a claim upon which relief can be granted. The action was dismissed before an answer was filed pursuant to the defendants-appellees' motions. We are of the opinion that the district court should be affirmed but not for the reasons stated in its opinion.

The plaintiffs, a Tennessee corporation and a Tennessee independent contractor, contend that they were not given the opportunity to obtain a cable TV franchise in the Millington, Tennessee ("Millington") geographical area because Millington and Millington Telephone Company ("Millington Telephone") had entered into an illegal agreement and understanding. The defendants are a telephone company, the City of Millington, Tennessee, and a corporation and its owner ("Howard") and chief executive officer. Defendant, Millington, a Tennessee municipality, without the public notice required by Tennessee Code Annotated Section 7-59-102(a) enacted an ordinance in 1979 by which Millington obligated itself to issue a cable television franchise to defendant Millington Telephone which is owned by defendant Howard, who was then and continued thereafter to be an elected member of the governing body of Millington, the Board of Mayor and Aldermen. Millington's Board of Mayor and Aldermen did not solicit bids or entertain unsolicited applications from willing and able applicants for the franchise. Plaintiff Matrix Enterprises, Inc. ("Matrix"), a provider of cable television services, requested the opportunity to apply for the opportunity to enter into a franchise agreement, but Millington refused

to honor the request responding that Matrix need not apply because "the franchise" had already been granted.

As to the plaintiffs' theory of legal liability under RICO, the record reflects that the plaintiffs failed to allege in their complaint two predicate acts necessary to support a civil action under 18 U.S.C. Section 1964(c). Further, the plaintiffs, although relying upon mail fraud, failed to properly allege fraud under Fed. R. Civ. P. 9(b). See also *DeCarlo, et al. v. Southland Corporation,* (slip op. No. 83-1525 6th Cir. 1984).

With respect to plaintiffs' antitrust theory of legal liability, we have taken note of the fact that in oral argument presented to the court the plaintiffs' attorney acknowledged that the cable TV franchise in question is a nonexclusive franchise. Therefore, as such does not involve a monopoly, no antitrust violation can be stated upon which relief can be granted.

The remaining relief sought by the plaintiffs, viz., a declaratory judgment as to the meaning of a Tennessee statute, was properly dismissed by the district court as such involved pendent jurisdiction. Therefore, the judgment of the district court is AFFIRMED.

(Filed April 17, 1985)

No. 84-5097

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MATRIX ENTERPRISES, INC.
AND WILLIAM R. ORMES,
Plaintiffs-Appellants,

v.

MILLINGTON TELEPHONE CO., INC., ET AL.,
Defendants-Appellees

ORDER

BEFORE: KENNEDY, CONTIE and MILBURN, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/ John Hehman
John P. Hehman, Clerk

(Filed December 31, 1983)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

C-82-2343-H

MATRIX ENTERPRISES, INC., and
WILLIAM R. ORMES,
Plaintiffs,

v.

MILLINGTON TELEPHONE COMPANY, INC.; CITY OF MILLINGTON, TENNESSEE; MILLINGTON CATV, INC.; and WILLIAMS S. HOWARD,
Defendants.

ORDER GRANTING MOTIONS TO DISMISS

This action arises out of certain actions surrounding the award of a cable television franchise by the City of Millington to Millington Telephone Company, Inc., and the subsequent transfer of the franchise to Millington CATV, Inc. Plaintiffs have alleged that the activities of the defendants constitute a violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, as well as a violation of the Racketeer Influenced and Corrupt Organizations Act (RICO Act), 18 U.S.C. § 1961, et seq. Defendants have moved this Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss all claims asserted against them for failure to state a claim upon which relief can be granted. After careful consideration of the record and following oral arguments on the motions, the Court grants the motions and dismisses the complaint.

The relevant facts, as alleged in the complaint, can be summarized as follows. Plaintiff Matrix Enterprises, Inc., ("Matrix") is in the business of providing cable television service to subscribers in several states, including Tennessee, which is its principal place of business. Plaintiff Ormes, also a Tennessee resident, is an independent contractor actively engaged in the business of securing cable television franchises for Matrix. He is compensated by receiving a percentage of the revenue obtained by Matrix from subscribers in the areas for which he secures a franchise.

Defendant Millington Telephone Company, Inc. ("Millington Telephone") is a privately owned Tennessee corporation doing business as a public utility providing telephone service to residents of Millington, Tennessee, and certain outlying areas. Defendant Millington CATV, Inc. ("Millington CATV") is also a Tennessee corporation, providing cable television service to Millington subscribers, pursuant to a franchise granted to Millington Telephone and assigned to Millington CATV. Defendant Millington, Tennessee, ("Millington") is a municipal corporation chartered by the State of Tennessee. Defendant William S. Howard, a Millington resident, is an elected member of the Millington Board of Mayor and Aldermen and, at all times relevant to the allegations in the complaint, a principal owner and chief executive officer of both Millington Telephone and Millington CATV.

On April 2, 1979, Millington Telephone expressed to the Board of Mayor and Aldermen a desire to be franchised as a provider of cable television service to Millington residents. Defendant Howard was not present at this meeting, and the Board postponed action on the request of Millington Telephone.

On July 2, 1979, the Board enacted Millington Ordinance 1979-8 granting a cable television franchise to Millington Telephone, contingent upon Millington Telephone receiving a necessary cross-ownership waiver from the Federal Communications Commission allowing the telephone company to enter the cable television market. This ordinance was enacted without the public notice required by Tennessee Code Annotated § 7-59-102(a). The ordinance, according to the complaint, included the following provisions:

(a) The franchise is for a period of 35 years.

(b) Millington Telephone was permitted up to three years within which to secure the necessary waivers from the FCC.

(c) Millington Telephone was given four years within which to commence transmitting signals to subscribers.

(d) All rates, charges or fees require approval by the Board.

(e) Millington Telephone agreed to pay Millington on a semi-annual basis an amount equal to three percent of the gross rental revenue received by Millington Telephone from its cable subscribers.

(f) Millington Telephone agreed that it would not sell, transfer or assign the franchise without prior approval of the Board.

On or about July 11, 1979, Millington Telephone filed an application with the Rural Electrification Administration to obtain a loan guarantee for funds needed to provide cable television services to Millington. In May of 1980 Millington Telephone filed a petition with the FCC requesting a waiver of the FCC rules prohibiting cross

ownership of a cable television service in its telephone service area.

On November 24, 1980, before the FCC acted on the waiver petition, the Board approved an assignment of the franchise from Millington Telephone to Millington CATV. The following month Millington Telephone requested that the FCC dismiss its waiver petition.

At no time, either when the original proposal was made or when the assignment was approved, did Millington solicit cable television companies to become applicants for cable franchises. On several occasions after Millington Telephone was granted the contingent franchise plaintiff Ormes, on behalf of plaintiff Matrix, sought to make a proposal for a cable franchise to the Board. The Board, however, has at all times refused to consider or respond to the proposals and requests of Matrix.

Although defendant Howard recused himself from voting on the ordinance, the other Aldermen were aware of Howard's interest in the outcome of the vote. The Complaint alleges that the defendants conspired with each other and with the other members of the Board to restrain trade and prohibit free and open competition between competitors in the cable television service industry. The violations of the Sherman Act alleged by the complaint include the following: granting a franchise to a company in which Howard holds an interest in violation of T.C.A. § 6-2-402; granting a conditional franchise to Millington Telephone; enacting an ordinance requiring the Board to approve rates; enacting an ordinance requiring Board approval of any transfer or assignment of the franchise; discriminating against outsiders by making the fact of whether an applicant is an outsider a determining factor in deciding whether to grant a franchise; refusing to con-

sider other applicants; granting a franchise for a period of 35 years, a time period in excess of the customary length in the industry; and granting the franchise without public notice.

The complaint also alleges violations of the RICO Act, 18 U.S.C. § 1961, et seq. The plaintiffs claim that the defendants aided and abetted by the use of interstate mail and interstate wire transmissions in furtherance of a scheme to defraud the citizens of Millington by acting in violation of the Tennessee conflict of interest statute, T.C.A. § 6-4-402, and by denying the Millington citizens the benefits to be derived from free and open competition in the cable television service market.

Thus the plaintiffs' complaint involve two basic claims—Sherman Act violations and RICO Act violations. Because the Court views the allegations regarding RICO Act violations most clearly ripe for dismissal, these allegations will be addressed first.

The Court finds that, even assuming that all the allegations of plaintiffs can be proved, the alleged actions are not within the scope of the RICO Act. Civil claims are permitted by the Act by 18 U.S.C.§1964(c). This language in this section is arguably broad enough to encompass the claims made by plaintiffs, but the legislative history and court interpretations indicate that the Act was not meant to cover such claims.

The RICO Act is a part of the Organized Crime Control Act of 1970. It makes it unlawful for any person employed by or associated with an enterprise engaged in interstate commerce from conducting or participating in the affairs of the enterprise through a "pattern of racketeering." 18 U.S.C. § 1962(c). "Enterprise" is defined as including any individual, partnership, corporation, asso-

ciation, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. 18 U.S.C. § 1961(4). A "pattern of racketeering activity" requires two acts of racketeering activity within 10 years of each other. 18 U.S.C. § 1961(5). "Racketeering activity" is defined to include an act indictable under certain provisions of Title 18. 18 U.S.C. § 1961(1)(B). The plaintiffs have alleged mail fraud and wire fraud as the indictable offenses constituting "racketeering activity." The civil provisions of the Act permit persons injured in their business or property by reason of a violation of the Act to sue for damages. 18 U.S.C. § 1964(c).

The use of the civil remedies in the RICO Act is still fairly new, and case law is limited. However, based on the authority now available this Court does not believe that the complaint states a claim upon which relief can be granted under the RICO Act. One of the first cases to examine the civil use of the Act was *Bar v. WUI/TAS, Inc.*, 90 F.R.D. 109 (S.D. N.Y. 1975). The court stated

> An examination of the legislative history of the Act . . . convinces us that the Act was not intended to create a private right of action upon facts such as those alleged here. The legislative history makes frequent references to "racketeers," "organized crime" and "organized crime families," as well as the "syndicate," "Mafia" and "Cosa Nostra." It is clear that it was aimed not at legitimate business organizations but at combating "a society of criminals who seek to operate outside of the control of the American people and their governments." There is no question that defendant cannot be characterized.

Id. at 113 (citations and footnotes omitted).

Plaintiff argues that the case of *United States v. Turkette*, 452 U.S. 576 (1981), apparently the only case decided by the United States Supreme Court interpreting the RICO Act, favors a very broad interpretation of the Act and leaves no basis for the restrictive analysis seen in cases like *Bar*. However, *Turkette* was a criminal case and does not require the broad application in civil cases advocated by plaintiffs. The Court finds quite persuasive language from *Waterman Steamship Corp. v. Avondale Shipyards*, 527 F. Supp. 256 (E.D. La. 1981), which was decided after *Turkette*. The court in *Waterman Steamship* relied upon *Turkette* in noting that Congress' overriding intent in drafting the RICO Act in the broad terms used was to provide an effective mechanism for eradicating organized crime and that the civil remedies provided by the statute are specific tools designed to assist in the eradication of organized crime in reaching its decision. The court stated:

> Although the language of Section 1964(c) upon which Delta bases its RICO cause of action is probably broad enough to be applied in this case, I conclude that the history of the statute (footnote omitted) reveals a clearly expressed legislative intent that RICO should apply only to actions involving organized crime activities, and not to everyday civil actions like those in this proceeding, involving private litigants with no relation to organized crime. To give RICO the broad and unlimited application suggested by Delta in this case would be to make a travesty of Congress' clear intent to the contrary. The civil remedies provisions of RICO were not designed to convert every fraud or misrepresentation action involving corporations who use the mails or telephones to conduct their businesses in interstate commerce

> into treble damages RICO actions. Rather, RICO civil provisions were enacted as an additional tool for use in the eradication of organized crin..

527 F. Supp. at 260.

The Court also finds some guidance in the recent Sixth Circuit case of *United States v. Thompson,* 669 F.2d 1143 (6th Cir. 1982). Although a criminal case, it was faced with an interpretation of "enterprise," which is a necessary element of either a civil or criminal case under RICO. The Court considered the issue of whether the office of governor of the State of Tennessee is an "enterprise" for RICO Act purposes. The court, after lengthy discussion of the history and purposes of the Act, ruled that it was not. The Court stated:

> It would, however, be a perversion of Congress's intent to continue to allow the potent weapon created in RICO to be lifted casually against every instance of venality in state and local governments.

Id. at 1149.

There is no allegation that the defendants were involved in any type of activity that would place it within the realm of the RICO Act. Therefore, the Court finds that as to the allegations relating to the RICO Act the plaintiffs have failed to state a claim upon which relief may be granted and the complaint must be dismissed as to these allegations.

The Court must now turn to the Sherman Act claims. Defendant Millington has urged the Court to dismiss the anti-trust claims against it because of the exemption frequently referred to as the "state action doctrine." This doctrine was first established by the United States Supreme Court in *Parker v. Brown,* 317 U.S. 341 (1943).

It holds that the states are immune from application of the antitrust statutes totally irrespective of the effect of their actions on competition. For a state's subdivision, such as a municipality, to be immune from antitrust liability the action in question must be taken pursuant to a clearly expressed state policy to displace competition with regulation or monopoly. *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978). Further, the anti-competitive action, whether taken by the state itself or through one of its subdivisions, must be actively supervised. The state cannot abdicate to private industry the responsibility to implement the regulatory scheme. *California Retail Liquor Dealers Association v. Mid-Cal Aluminum*, 445 U.S. 97 (1980).

The United States Supreme Court has recently articulated the circumstances in which the state action doctrine applies to the actions of a city in controlling the construction and operation of cable television systems. *Community Communications Co. v. City of Boulder*, 455 U.S. ....., 102 S.Ct. 835 (1982). In *Boulder* the city declared a temporary moratorium on the expansion of cable services. The existing provider of services, who was adversely affected by the city's action, filed suit contending that the moratorium violated the antitrust laws. The Court noted that the state action exemption has been extended to "municipal conduct engaged in 'pursuant to state policy to displace competition with regulation or monopoly public service.'" 102 S.Ct. at 841, quoting *City of Lafayette, supra* at 413.

In the *Boulder* case the city was regulating the cable television industry under a general home rule provision in the state constitution that extended to the city the right of self-rule in local and municipal affairs. On these particular facts, the Supreme Court found no "state policy to displace competition with regulation or monopoly pub-

lic service." Instead, the state's position, the Court said, was one of "mere neutrality." However, the Court repeated the language of *City of Lafayette* that the decision "means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." 102 S.Ct. at 843-44, quoting *City of Lafayette, supra* at 416.

The plaintiffs have argued that *Boulder* is "factually analogous" to the instant case. The defendants argue that *Boulder* is clearly distinguishable and, in fact, its teachings fully support defendants' position. A determination of this issue involves the application of T.C.A. § 7-59-102, et seq. The statute gives local municipalities the "power and authority" to regulate the cable television industry within its territorial limits. Plaintiff argues that the statute demonstrates a policy of "mere neutrality" as in *Boulder* since the statute is permissive in nature and is strictly a matter of local option. If a municipality chooses not to regulate, the plaintiffs argue, the statute has no bearing on it in any way. Defendants argue, on the other hand, that the Tennessee legislature has, in the case of the cable television industry, chosen to displace free an unfettered competition with regulation. The defendants' view appears to the Court to be the correct one.

Under the statute, any company desiring to furnish cable services to Tennessee residents must obtain a franchise. The legislature has authorized the appropriate subdivisions of the state to make the determination of who will, and who will not, be licensed. While it is true that the statute does not *require* a municipality to grant exclusive franchises as Millington chose to do, it certainly authorizes such an action. The legislature undoubtedly contemplated that such regulation might "displace competition."

The plaintiffs have also asserted that the state doctrine should not apply because the state did not actively supervise the regulatory scheme. In making this argument, the plaintiffs rely on the *Mid-Cal* case, *supra*. *Mid-Cal* involved a California statute under which all wine producers, wine wholesalers and wine rectifiers in the state were required to file fair trade contracts and price schedules with the state. No wine merchant in the state could sell wine to a retailer at any price other than that set in the filed schedule or contract. The Supreme Court found that the state action doctrine did not apply. The state neither established the prices nor reviewed the reasonableness of the prices which were fixed by the private parties. That situation is clearly distinguishable from the instant case in which a state subdivision has acted with authority of a state statute to grant a cable television license.

Therefore, the Court finds the state action doctrine, as enunciated in *Parker* and subsequent decisions is applicable to defendant Millington. The motion to dismiss the Sherman Act claims against Millington must be granted.

The remaining defendants—Millington Telephone, Millington CATV and Howard—seek to have the Sherman Act claims dismissed on the basis of what is often referred to as the "Noerr-Pennington Doctrine." This doctrine grew out of a series of Supreme Court decisions beginning with *Eastern Railroad Presidents' Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). The case involved an antitrust action by 41 truck operators and their trade association against 24 railroads, an association of railroad presidents and a public relations firm. The complaint alleged a conspiracy to restrain trade and monopolize long distance freight business based on a publicity campaign by

the defendants against the truckers designed to persuade legislative and executive branches of state governments to take actions injurious to the trucking industry.

The Supreme Court in *Noerr* held that the concerted conduct to influence public officials was not forbidden by the Sherman Act, regardless of its anticompetitive effect. 365 U.S. at 136-37. The Court stated:

> To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act."

Id. at 137.

Four years later in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), the *Noerr* rationale was reaffirmed and applied in a situation where the concerted action to influence public officials was part of a broader scheme which itself was violative of the Act. The Court stated:

> *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.
>
> * * *
>
> Joint efforts to influence officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

381 U.S. at 670.

The Seventh Circuit applied the *Noerr-Pennington* doctrine affirm a district court dismissal of an antitrust case brought by an unsuccessful applicant for a cable television franchise in Rockford, Illinois. *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975). Activities alleged in that case that were intended to influence public officials included substantial campaign contributions to members of the council and misrepresentations to the council's planning and finance committee. The plaintiff accused the board of making secret decisions to do nothing and to allow the defendant cable television company to operate the only service in the city. The allegations also included a charge that the mayor issued a false certificate to the FCC to the effect that a public proceeding was held when no such proceeding was actually held. The Court held that the defendants' actions were shielded from application of the antitrust laws. *Id.* at 229.

Plaintiffs have argued that the *Noerr-Pennington* doctrine does not apply because this case fits into at least one of several recognized exceptions to the doctrine. The Court will address these four exceptions as set forth in plaintiffs' memorandum.

(1) The "Sham" Exception. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the defendants filed baseless, repetitive proceedings in state and federal courts to defeat applications of competing trucking companies for operating rights. This involved the use of unethical conduct in administrative agencies and the judiciary and was distinguished from actions which would be "condoned in the political arena." 404 U.S. at 513. The "sham" exception does not apply in the instant case where the non-governmental defendants were openly seeking the franchise and successfully lobbied the Board to receive it.

(2) The Commercial Exception. Although the plaintiffs mention this exception (involving situations where the government is, in effect, acting as a consumer rather than policymaker or regulator), they apparently concede that the doctrine would not apply to this case.

(3) Predatory or Fraudulent Means Exception. An exception has been recognized where otherwise bona fide concerted efforts are accompanied by illegal predatory or fraudulent means. This exception does not appear to apply to the activities of defendants. They did not use threats, intimidation or other coercive measures as the defendant unions did in *Sacramento Coca-Cola Bottling Co. v. Chauffers, Teamsters and Helpers Local* 150, 40 F.2d 1096 (1971). Also, no fraud was perpetrated on the government body as was the case in *Woods Exploration & Production Co. v. Aluminum Co. of America,* 438 F.2d 1286 (1971), *cert. denied* 404 U.S. 1047 (1972). (To the contrary, assuming the allegations are true, Millington was a part of the scheme rather than a victim of it.)

(4) Co-Conspirator exception. The parties are in disagreement over whether there exists a valid exception, as plaintiffs contend, for situations where the governmental entity or official sought to be influenced is itself a co-conspirator. Since the city enjoys immunity under the state action doctrine, this exception, assuming it does exist, would not be applicable.

Therefore, the Court having concluded that the actions of the non-governmental defendants in this case fall within the purview of the *Noerr-Pennington* doctrine, the motions to dismiss the antitrust claims against them must be dismissed.

In conclusion, the Court notes another district court decision, in the Western District of Kentucky, that reached

the same result as this Court has reached in a very similar case. In *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, Civil Action No. 81-0270-P(G) (W.D. Ky.), the plaintiff filed suit against a competing cable television company, the city, the mayor and the city attorney. The plaintiff had provided cable service for 15 years and requested a franchise from the city so that it could continue operation. The city council passed an ordinance authorizing the city to grant a non-exclusive franchise for a term of fifteen years to any cable television business. Proposals were received from three suppliers, including the plaintiff and defendant Pennyroyal. Pennyroyal informed the council that it would withdraw its application unless the franchise was exclusive. The plaintiff was agreeable to receiving a non-exclusive franchise. The council considered the three proposals and awarded an exclusive franchise to Pennyroyal.

The Court in the *Hopkinsville* case found it unnecessary to consider the merits of the antitrust claims since the city was protected by the state action doctrine and the remaining defendants, including the mayor, were protected by the *Noerr-Pennington* doctrine.

The Court therefore finds that the plaintiffs have failed to state a claim upon which relief may be granted and, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, grants the motions to dismiss and dismisses the action.

IT IS SO ORDERED.

Entered this 31st day of December, 1983.

/s/ Odell Horton
Odell Horton, Judge
United States District Court

(Filed January 4, 1984)

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

District
WESTERN DISTRICT OF TENNESSEE

Docket Number
C-82-2343

CA ....TLE

MATRIX ENTERPRISES, INC. and
WILLIAM R. ORMES, Plaintiffs

v.

MILLINGTON TELEPHONE COMPANY, CITY OF MILLINGTON, TENNESSEE, ET AL

Name of Judge
ODELL HORTON

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that in compliance with the Order Granting Motions to Dismiss entered December 30, 1983, the case is hereby dismissed.

APPROVED:

/s/ Odell Horton
Odell Horton
United States District Judge

(Filed May 14, 1982)

Civil Action No. 82-234311

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

MATRIX ENTERPRISES, INC.
and WILLIAM R. ORMES,
Plaintiffs

v.

MILLINGTON TELEPHONE COMPANY, INC.; CITY OF MILLINGTON, TENNESSEE; MILLINGTON CATV, INC.; and WILLIAM S. HOWARD,
Defendants

JURY DEMANDED

COMPLAINT

JURISDICTION

1. Subject matter jurisdiction is conferred on this Honorable Court by Title 28, *United States Code* §1331; Title 15, *United States Code* § 4; and Title 18, *United States Code* § 1964(c); and, authority to grant the relief sought is bestowed by Title 15, *United States Code* §§ 15 and 26; Title 28, *United States Code* § 2201 and Title 18, *United States Code* § 1964(c).

2. Venue is established in the Western District of Tennessee in accordance with the provisions of Title 28, *United States Code* §§ 1391(b) and 1391(c) and Title 18, *United States Code*, § 1965 by virtue of the fact that defendant corporations have their principle places of business in the Western District of Tennessee, and the major

part of the business engaged in by defendant corporations is done in the Western District of Tennessee. The individual defendant is a resident citizen in the Western District of Tennessee. Finally, the acts and transactions which form the basis of the allegations contained herein occurred in or emanated from the Western District of Tennessee.

PARTIES

3. Plaintiff, Matrix Enterprises, Inc. (hereinafter "Matrix") is a corporation formed under the laws of Tennessee with its principle place of business located at 108 Bridge Street, Franklin, Tennessee. Matrix has conducted business since 1975 and is presently conducting business in Tennessee, Ohio, Kentucky and Illinois as a provider of cable television service which entails receiving signals transmitted in interstate commerce and re-transmitting those signals, for a fee, to ultimate consumers. Matrix is a going business actively competing in the cable television product market doing business in interstate commerce.

4. Plaintiff, William R. Ormes (hereinafter "Ormes") is a resident citizen in Franklin, Tennessee. Ormes is an independent contractor actively engaged in the business of securing the status of a cable television franchise holder for Matrix in given areas. Ormes is compensated by receiving from Matrix, on a continuing basis, a specified percentage of the revenues received by Matrix from subscribers using the services of Matrix because of a franchise secured through the efforts of Ormes.

5. Defendant, Millington Telephone Company, Inc. (hereinafter "Millington Telephone") is a privately owned Tennessee corporation with its principle place of business located at 4880 Navy Road, Millington, Tennessee doing

business as a public utility providing telephone service in and to the residents of Millington, Tennessee and certain outlying areas of Shelby, Tipton and Fayette County Tennessee.

6. Defendant, William S. Howard (hereinafter "Howard") is a resident citizen in the Western District of Tennessee. Howard presently is, and at all times relevant to the matters herein alleged was, a member of the Board of Mayor and Aldermen (hereinafter "Board") elected by an electorate of constituents residing in Millington, Tennessee. The Board is the governing body of the government of Millington, Tennessee. Also, Howard is, and at all times relevant to the allegations herein was, a principle owner and chief executive officer of Millington Telephone and Millington CATV, Inc.

7. Defendant, Millington CATV, Inc. (hereinafter "Millington CATV") is a Tennessee corporation with its principle place of business located at 4880 Navy Road, Millington, Tennessee doing business in the Western District of Tennessee. Millington CATV was incorporated on March 19, 1980 for the sole purpose of becoming the assignee of rights purportedly accorded by ordinance enacted by the Board to Millington Telephone to provide cable television service in and to subscribers residing within the territorial limits of Millington, Tennessee.

8. Defendant, City of Millington, Tennessee (hereinafter "Millington") is a municipal corporation having been chartered by the State of Tennessee for the purpose of providing governmental services to the residents of an area of Shelby County, Tennessee known as Millington, Tennessee. According to the 1980 decennial census, Millington had a population of 21,177 persons making up 6,800 households.

PREDICATE FACTS

9. All governmental action of municipalities, including Millington, is subject to the federal antitrust laws and the policy of free markets and open competition embodied therein unless and to the extent such action is in furtherance of power and authority of the State in which it is located and is delegated, clearly articulated and affirmatively expressed by state statute.

10. The State of Tennessee enacted the Cable Television Act of 1977, *Tennessee Code Annotated* § 7-59-102 (hereinafter "Act") whereby municipalities, including Millington, are bestowed with "the power and authority to regulate the operation of any cable television company which serves customers within its territorial limits by the issuance of franchise licenses."

11. The Act articulates a state policy, that to legally provide cable television service to subscribers within the territorial limits of a municipality, including Millington, the provider must first be franchised to do so by governmental action of the municipality.

12. The Act does not empower a municipality to (1) create a monopoly, de facto or de jure; (2) unreasonably restrain competition in the cable television franchise product market by refusing to consider all but one application to become a franchisee; (3) unreasonably restrain competition by permitting a favored franchisee to obtain unfair advantage over competitors by excluding competition for a period of time sufficient for the favored franchisee to capitalize, become operational, and initially capture the market; (4) unreasonably restrain competition by granting a franchise for an unreasonably long period of time; (5) unreasonably restrain competition by granting a franchise to a person or entity not qualified under the rules of

the Federal Communications Commission (hereinafter "FCC") to provide cable television service on the date the franchise is effective; (6) unlawfully agree with a franchisee to fix prices which may be charged to customers to whom the franchisee provides cable television services; (7) prohibit or restrain, unilaterally or by agreement with a franchisee, the transferability of rights acquired by the franchise to persons or entities willing and able to perform the duties and obligations agreed to by the original franchisee; (8) unreasonably restrain competion by discriminating in the issuance of franchises based solely on whether the applicant for a franchise is an "outsider;" or (9) unreasonably restrain competition by granting a franchise in which an officer of Millington is interested in violation of the conflict of interest prohibitions codified in *Tennessee Code Annotated,* § 6-2-402.

13. Neither the Act nor any other statement of state policy prohibited or prevented Millington, acting through the Board, from considering applications from cable television providers to become franchisees to provide cable television service for the residents of Millington.

14. The Act did not empower the members of the Board to exercise the authority inherent in their office by individually and arbitrarily refusing: (1) to consider requests of cable television service providers to be awarded a franchise; (2) to create an illegal monopoly; or, (3) to otherwise illegally restrain trade in the cable television service product market within the territorial limits of Millington.

15. It is a per se conflict of interest and a violation of state policy and statute, *Tennessee Code Annotated,* § 6-2-402, for an elected official of Millington, directly or indirectly, to be interested in any contract to which Millington is a party.

16. By regulation, i.e., FCC Rules, §§ 63.55 and 64.602, codified in Title 47, *Code of Federal Regulations* § 63.55 and § 64.602, the FCC is charged with prohibiting one person or entity from having an ownership interest, at the same time, in both a telephone company and a provider of cable television service. Under certain circumstances, the FCC is given the discretion to waive application of this regulatory prohibition.

17. Each member of the Board, serving in office between April 2, 1979 and March 13, 1981, individually and the Board as an entity, at all times relevant to the allegations herein, owed a duty creating a right in the citizenry of Millington to the conscientious, loyal, faithful and unbiased services, judgment, decisions, actions and performance by each alderman and the Board of his/its duties free from partiality, willful omission and personal interests inconsistent with the interest of his/its constituency.

SPECIFIC FACTS

18. On April 2, 1979, it is first recorded that Millington Telephone expressed to the Board a desire to be franchised as a provider of cable television service to persons residing in Millington. Said request was made in the absence of Howard. The Board postponed further action on the request of Millington Telephone until a meeting could be arranged with Howard.

19. Without the public notice required by *Tennessee Code Annotated* §7-59-102(a), on July 2, 1979, the Board enacted Millington Ordinance 1979-8 which purportedly provided, in summary, that Millington Telephone would be a franchisee to provide cable television service to subscribers residing within the territorial limits of Millington contingent on Millington Telephone obtaining the necessary waivers from the FCC.

20. By said Ordinance 1979-8, Millington agreed with Millington Telephone that Millington Telephone would serve as a franchisee to provide cable television service to residents living within the territorial limits of Millington for a period of thirty-five (35) consecutive years from July 12, 1979. On November 24, 1980, Millington ratified an assignment of said franchise by Millington Telephone to Millington CATV.

21. Millington Telephone was not and has never been qualified, by FCC waiver, to be the recipient of a franchise to provide cable television service to subscribers residing within the territorial limits of Millington.

22. That which Millington attempted to grant to Millington Telephone by Ordinance 1979-8 was not a franchise in accordance with the authority bestowed on Millington by the Act.

23. The assignment by Millington Telephone to Millington CATV, purportedly ratified by Millington by Resolution on November 24, 1980, was a nullity and is illusory in its attempt to grant to Millington CATV the right to provide cable television service.

24. Neither before nor after the request of Millington Telephone to the Board, as aforesaid in paragraph 18, did Millington solicit bids from businesses competing in the cable television product market to make application for franchises to be a provider of cable television service to subscribers residing in the territorial limits of Millington and, further, refused to consider proposals from unsolicited applicants, other than Millington Telephone, for franchises.

25. By said Ordinance 1979-8, Millington agreed with Millington Telephone that Millington Telephone would be permitted up to three years from July 12, 1979 within

which to secure from the FCC a waiver from application of FCC Rules §§63.55 and 64.602 which, unless waived, would prohibit Millington Telephone from being a provider of cable television service consistent with the rules and regulations of the FCC.

26. By Ordinance 1979-8, Millington agreed with Millington Telephone that Millington Telephone need not commence transmitting signals to subscribers residing in the territorial limits of Millington sooner than four years from July 12, 1979.

27. By Ordinance 1979-8, Millington agreed with Millington Telephone that Millington Telephone could set no rate nor charge any fee to a subscriber to whom or which cable television service was to be provided by Millington Telephone without first having had said rate or charge previously approved by the Board.

28. By Ordinance 1979-8, Millington Telephone agreed with Millington, as consideration, to pay Millington, on a semi-annual basis, an amount of money equal to three (3%) percent of the gross rental revenue received by Millington Telephone from its cable television subscribers.

29. By Ordinance 1979-8, Millington Telephone agreed with Millington that Millington Telephone, during the franchise period, would not sell, transfer or assign the purported franchise without prior approval of the Board.

30. On or about May 2, 1980, Millington Telephone filed a petition with the FCC requesting that the FCC waive application of FCC Rules §§63.55 and 64.602 prohibiting Millington Telephone from providing cable television service.

31. On or about June 1, 1980, Ormes was advised that Millington was not accepting or considering applications for franchises to provide cable television service to subscribers residing in the territorial limits of Millington. Thereby, Matrix was restrained from making such an application.

32. On or about June 6, 1980, the advice given on or about June 1, 1980 to Ormes was reconfirmed by or on behalf of defendants. Thereby Matrix was further restrained from making application as aforesaid.

33. On or about June 10, 1980, Ormes sent a letter to all members of the Board, each separately, formally notifying each that a company to be named Shelby Cable TV, Inc., as a subsidiary of Matrix, wished to submit a proposal to provide cable television service to subscribers residing in the territorial limits of Millington.

34. On or about July 11, 1979, Millington Telephone, by and through Howard, commenced the filing process to secure a loan guarantee from the United States through its agency, the Rural Electrification Administration, stating, in substance, as the purpose for the loan, to pay costs incident to Millington Telephone providing cable television service to subscribers residing within the territorial limits of Millington.

35. On November 24, 1980, Millington, through the Board, adopted a resolution approving assignment by Millington Telephone of the purported franchise, codified as Ordinance 1979-8 to Millington CATV.

36. On or about December 9, 1980, Millington Telephone, by and through Howard, requested the FCC to dismiss the petition of Millington Telephone requesting waiver of application of FCC Rules §§63.55 and 64.602 pro-

hibiting Millington Telephone from providing cable television service to subscribers residing in the territorial limits of Millington.

37. On or about March 10, 1981, Ormes, acting for and on behalf of Matrix, sent a letter to Howard, as president of Millington Telephone and Millington CATV, expressing the vital interest of Matrix in developing a cable television system in Millington. Said letter further expressed the opinion that the purported franchise agreement between Millington and Millington Telephone and/or Millington CATV prohibited Matrix from being able to progress toward obtaining a franchise. In said letter, Ormes expressed the interest of Matrix in buying the purported franchise rights held by Millington Telephone and/or Millington CATV.

38. On or about March 13, 1981, Howard, as president of Millington Telephone, sent a letter to Ormes stating, among other things, that what he referred to as "this franchise" was not for sale.

39. The Board members, acting individually but using the power accorded them by their elected office, have refused to make it a matter of business for the Board, as the governing body of Millington, to hear, entertain, consider or respond to applications or other notifications of intent and desire on the part of Matrix and Ormes, as well as others not a party to this action, to become a franchisee to provide cable television service to residents living within the territorial limits of Millington.

40. Millington, in concert with its co-defendants and the individual members of the Board, serving in office between April 2, 1979 and March 13, 1981, in addition to Howard, engaged in all of the conduct and practices enumerated in paragraph 12 above.

41. Full well knowing that one of its officers, i.e., Howard, would have an interest therein, Millington, through the Board, by the enactment of Ordinance 1979-8 and by adoption of a resolution on November 24, 1980 authorizing Millington CATV to be the assignee of the purported franchise awarded by said Ordinance, entered into contractual relationships with Millington Telephone and with Millington CATV.

42. The members of the Board individually and in concert with Millington Telephone willfully refused to solicit competitive offers from various potential providers of cable television service to residents within the territorial limits of Millington.

COUNT I

(Monopolization)

43. Plaintiffs reallege by incorporation all of the heretofore made allegations the same as if quoted verbatim.

44. Each of the defendants, separately, and in combination and conspiracy with each other and with the individual members of the Board who served continuously in office between April 1, 1979 and March 13, 1981 and are not named as defendants, unlawfully did monopolize and attempt to monopolize and aid, assist and counsel each other to monopolize and attempt to monopolize a part of the trade and commerce among the several states, namely, the cable television service market within the territorial limits of Millington. More specifically, defendants did monopolize and attempt to monopolize, as aforesaid, by arbitrarily exercising, or causing the exercise of, the power of Millington over the decision as to whom was qualified to compete in said market. Said power was exercised and attempted to be exercised with the intent to exclude ready,

willing and able competitors thereby protecting the entire market for entities controlled by Howard. Thereby, defendants violated Title 15, *United States Code* § 2.

COUNT II

(Restraint of Trade)

45. Plaintiffs reallege by incorporation all of the heretofore made allegations the same as if quoted verbatim.

46. Each of the defendants, in combination and conspiracy with each other and with the individual members of the Board who were in office continuously between April 1, 1979 and March 13, 1981 and are not named as defendants, unlawfully did restrain trade and commerce among the several states by prohibiting free and open competition between and among competitors ready, willing and able to compete in an effort to become franchised providers of cable television service to subscribers residing within the territorial limits of Millington. More specifically, in concert with each other as aforesaid, defendants unlawfully did restrain trade and commerce, as aforesaid, by granting what was deemed by Millington to be a cable television franchise to Millington Telephone thereby making a contract in which an officer of Millington, i.e., Howard, was interested, in violation of *Tennessee Code Annotated,* § 6-2-402; thus, the contract created by said grant was void ab initio as illegal per se and contrary to public policy. Thereby defendants violated Title 15, *United States Code,* § 1.

COUNT III

(Restraint of Trade)

47. Plaintiffs reallege by incorporation all of the heretofore made allegations the same as if quoted verbatim.

48. Each of the defendants, in combination and conspiracy with each other and with the individual members of the Board who were in office continuously between April 1, 1979 and March 13, 1981 and are not named as defendants, unlawfully did restrain trade and commerce among the several states by prohibiting free and open competition between and among competitors ready, willing and able to compete in an effort to become franchised providers of cable television service to subscribers residing within the territorial limits of Millington. More specifically, in concert with each other as aforesaid, defendants unlawfully did restrain trade and commerce, as aforesaid, by granting what was deemed by Millington to be a cable television franchise to Millington Telephone when, in fact, Ordinance 1979-8, by which said grant was attempted, was not the grant of a cable television franchise because, on the effective date of the purported franchise, Millington Telephone was not qualified under the regulations of the FCC to provide cable television service. Thus, the enactment of Ordinance 1979-8 by defendants was an exercise of the power of Millington to discourage, limit, inhibit and restrain ready, willing and able cable television providers from competing with Howard or entities controlled by Howard. Thereby, defendant violated Title 15, *United States Code*, § 1.

COUNT IV

(Restraint of Trade)

49. Plaintiffs reallege by incorporation all of the heretofore made allegations the same as if quoted verbatim.

50. Each of the defendants, in combination and conspiracy with each other and with the individual members of the Board who were in office continuously between April 1, 1979 and March 13, 1981 and are not named as de-

fendants, unlawfully did restrain trade and commerce among the several states by prohibiting free and open competition between and among competitors ready, willing and able to compete in an effort to become franchised providers of cable television service to subscribers residing within the territorial limits of Millington. More specifically, in concert with each other as aforesaid, defendants unlawfully did restrain trade and commerce, as aforesaid, by entering into a contract between Millington and Millington Telephone by which Millington and Millington Telephone agreed to fix all prices which Millington Telephone would charge subscribers to whom Millington Telephone supplied cable television service only after neutral approval. Thereby, defendants violated Title 15, *United States Code*, § 1.

COUNT V

(Restraint of Trade)

51. Plaintiffs reallege by incorporation all of the heretofore made allegations the same as if quoted verbatim.

52. Each of the defendants, in combination and conspiracy with each other and with the individual members of the Board who were in office continuously between April 1, 1979 and March 13, 1981 and are not named as defendants, unlawfully did restrain trade and commerce among the several states by prohibiting free and open competition between and among competitors ready, willing and able to compete in an effort to become franchised providers of cable television service to subscribers residing within the territorial limits of Millington. More specifically, in concert with each other as aforesaid, defendants unlawfully did restrain trade and commerce, as aforesaid, by entering into a contract between Millington and Millington Telephone by which Millington and Millington Tele-

phone agreed that the rights acquired by Millington Telephone would not be transferred to another person or entity willing and able to perform all lawful obligations imposed by the contract between Millington Telephone and Millington without the prior agreement of Millington. Thereby, defendants violated Title 15, *United States Code*, § 1.

COUNT VI

(Restraint of Trade)

53. Plaintiffs reallege by incorporation all of the heretofore made allegations the same as if quoted verbatim.

54. Each of the defendants, in combination and conspiracy with each other and with the individual members of the Board who were in office continuously between April 1, 1979 and March 13, 1981 and are not named as defendants, unlawfully did restrain trade and commerce among the several states by prohibiting free and open competition between and among competitors ready, willing and able to compete in an effort to become franchised providers of cable television service to subscribers residing within the territorial limits of Millington. More specifically, in concert with each other as aforesaid, defendants unlawfully did restrain trade and commerce, as aforesaid, by discriminating in the exercise of the power and authority delegated by the Act to grant franchises by making the fact of whether an applicant for a franchise is an outsider a determining factor in deciding whether to grant a franchise. Thereby, defendants violated Title 15, *United States Code*, § 1.

COUNT VII

(Restraint of Trade)

55. Plaintiffs reallege by incorporation all of the heretofore made allegations the same as if quoted verbatim.

56. Each of the defendants, in combination and conspiracy with each other and with the individual members of the Board who were in office continuously between April 1, 1979 and March 13, 1981 and are not named as defendants, unlawfully did restrain trade and commerce among the several states by prohibiting free and open competition between and among competitors ready, willing and able to compete in an effort to become franchised providers of cable television service to subscribers residing within the territorial limits of Millington. More specifically, in concert with each other as aforesaid, defendants unlawfully did restrain trade and commerce, as aforesaid, by refusing, because of the enactment of Ordinance 1979-8, to accept and consider requests from ready, willing and able applicants for franchises permitting applicants to provide cable television service in Millington. Thereby, defendants violated Title 15, *United States Code*, § 1.

COUNT VIII

(Restraint of Trade)

57. Plaintiffs reallege by incorporation all of the heretofore made allegations the same as if quoted verbatim.

58. Each of the defendants, in combination and conspiracy with each other and with the individual members of the Board who were in office continuously between April 1, 1979 and March 13, 1981 and are not named as defendants, unlawfully did restrain trade and commerce among the several states by prohibiting free and open competition between and among competitors ready, willing and able to compete in an effort to become franchised providers of cable television service to subscribers residing within the territorial limits of Millington. More specifically, in concert with each other as aforesaid, defendants

unlawfully did restrain trade and commerce, as aforesaid, by attempting to discourage competition by extending purported franchise rights to entities controlled by Howard for thirty-five (35) years, which is a period greatly in excess of the length of time customary in the industry, with the intent of protecting the market for entities controlled by Howard. Thereby, defendants violated Title 15, *United States Code*, § 1.

COUNT IX

(Restraint of Trade)

59. Plaintiffs reallege by incorporation all of the heretofore made allegations the same as if quoted verbatim.

60. Each of the defendants, in combination and conspiracy with each other and with the individual members of the Board who were in office continuously between April 1, 1979 and March 13, 1981 and are not named as defendants, unlawfully did restrain trade and commerce among the several states by prohibiting free and open competition between and among competitors ready, willing and able to compete in an effort to become franchised providers of cable television service to subscribers residing within the territorial limits of Millington. More specifically, in concert with each other as aforesaid, defendants unlawfully did restrain trade and commerce, as aforesaid, by enacting Ordinance 1979-8 without giving the prior notice required by the Act prerequisite to exercising the power and authority delegated to Millington by the Act. Thereby, defendants violated Title 15, *United States Code*, § 1.

COUNT X

(Restraint of Trade)

61. Plaintiffs reallege by incorporation all of the heretofore made allegations the same as if quoted verbatim.

62. Each of the defendants in combination and conspiracy with each other and with the individual members of the Board who were in office continuously between April 1, 1979 and March 13, 1981 and are not named as defendants, unlawfully did restrain trade and commerce among the several states by prohibiting free and open competition between and among competitors ready, willing and able to compete in an effort to become franchised providers of cable television service to subscribers residing within the territorial limits of Millington. More specifically, in concert with each other as aforesaid, defendants unlawfully did restrain trade and commerce, as aforesaid, by engaging in a series of acts and pattern of conduct including any two or more of the efforts and activities alleged separately and more specifically in each of the foregoing Counts hereof. Thereby, defendants violated Title 15, *United States Code*, § 1.

COUNT XI

(Civil RICO - Conflict of Interest)

63. Plaintiffs reallege by incorporation all of the heretofore made allegations the same as if quoted verbatim.

64. From on or about April 2, 1979, up through and including the present, Howard, aided, abetted, counseled and in conspiracy with his co-defendants, and aided, assisted and counseled by individuals who then were and remained members of the Board at least up through March 13, 1981 but who have not been named as defendants, be-

ing a person employed by and associated with Millington, with Millington Telephone and with Millington CATV, all of which are enterprises engaged in and the activities of which affect interstate commerce, unlawfully did conduct and participate in the conduct of the affairs of the aforesaid enterprises through acts defined in Title 18, *United States Code* § 1961(1)(B), more specifically, the use of the United States mails and the use of interstate wire transmissions in furtherance of a scheme which included defrauding the constituent citizens of Millington by denying them the conscientious, loyal, faithful and unbiased services, judgment, decisions and actions of the Board and each of its members, including Howard, free from the conflict of interests prohibited by *Tennessee Code Annotated,* § 6-2-402. In furtherance of said scheme, Howard used the United States mails and interstate wire transmissions on more than two occasions within a period between April 2, 1979 and March 13, 1981 thus constituting a pattern of activity as more particularly defined in Title 18, *United States Code* § 1961(5). Thereby, defendants violated Title 18, *United States Code,* § 1962(c).

COUNT XII

(Civil RICO - Misfeasance and Nonfeasance)

65. Plaintiffs reallege by incorporation all of the heretofore made allegations the same as if quoted verbatim.

66. From on or about April 2, 1979, up through and including the present, Howard, aided, abetted, counseled and in conspiracy with his co-defendants, and aided, assisted and counseled by individuals who then were and remained members of the Board at least up through March 13, 1981 but who have not been named as defendants, being a person employed by and associated with

Millington, with Millington Telephone and with Millington CATV, all of which are enterprises engaged in and the activities of which affect interstate commerce, unlawfully did conduct and participate in the conduct of the affairs of the aforesaid enterprises through a pattern of acts defined in Title 18, *United States Code* § 1961(1)(B), more specifically, the use of the United States mails and the use of interstate wire transmissions in furtherance of a scheme which included defrauding the constituent citizens of Millington by denying them the conscientious, loyal, faithful, impartial and unbiased services, judgment, decisions and actions of the Board and each of its members, including Howard, in the exercise of the power and authority accorded Millington by the Act so that said citizenry lost the benefits to be derived from free and open competition in the cable television service market. In furtherance of said scheme, Howard used the United States mails and interstate wire transmissions on more than two occasions within a period between April 2, 1979 and March 13, 1981 thus constituting a pattern of activity as more particularly defined in Title 18, *United States Code,* § 1961(5). Thereby, defendants violated Title 18, *United States Code,* § 1962(c).

RELIEF PRAYED

67. Plaintiffs, individually, both separately and jointly, have been injured in their business and property as a result of the injuries generally to open and free market competition because of the hereinbefore alleged conduct of defendants in violation of Title 15, *United States Code* §§1 and 2.

68. Plaintiffs, individually, both separately and jointly, have been injured competitively and otherwise in their business and property by Howard, in concert with

his co-defendants as hereinbefore alleged, conducting and participating in the conduct of Millington, Millington Telephone and Millington CATV through the pattern of activity prohibited by Title 18, *United States Code* §1962(c).

69. According to the best estimate now determinable, the injury to its business and property suffered by Matrix, as a result of the afore-alleged conduct of defendants, damaged Matrix by the loss of approximately fifteen million ($15,000,000.00) dollars.

70. According to the best estimate now determinable, the injury to his business and property suffered by Ormes, as a result of the afore-alleged conduct of defendants, damaged Ormes by the loss of approximately five million ($5,000,000.00) dollars.

WHEREFORE, plaintiffs respectfully pray that this Honorable Court:

1. Enter a final judgment against defendants, jointly and severally, awarding money damages to each of the plaintiffs in an amount treble the actual losses of each in addition to costs incurred by each of them in bringing suit and for a reasonable attorneys' fee.

2. Enter a declaratory judgment declaring Millington Ordinance 1979-8 to be null and void ab initio as an attempted exercise of power in violation of the antitrust laws of the United States and the public policy evidenced by *Tennessee Code Annotated,* § 6-2-402.

3. Enter a declaratory judgment declaring the assignment to Millington CATV of rights purportedly accruing to Millington Telephone, by virtue of Ordinance 1979-8, to be null and void.

4. Enter a declaratory judgment declaring that a franchise license granted by Millington under the power and authority of the Act constitutes a contract between Millington and the franchisee in which no officer of Millington may have an interest, directly or indirectly, without being in violation of *Tennessee Code Annotated* § 6-2-402.

5. Enter a permanent injunction prohibiting Howard from serving as a member of the Board and as a director of Millington CATV or any other provider of cable television service in Millington in violation of Title 15, *United States Code* § 19.

6. Enter a permanent injunction prohibiting Howard from ever having any interest, directly or indirectly, in any franchise license permitting the franchisee to provide cable television service to subscribers residing within the territorial limits of Millington.

7. Enter all other necessary orders and judgment granting all relief deemed appropriate by the Court and authorized under Title 18, *United States Code* §1964(a) relative to the interests of Howard in Millington Telephone, Millington CATV and Millington.

8. All other and further relief deemed necessary by the Court to accomplish justice.

PLAINTIFFS DEMAND A JURY TO TRY THE ISSUES OF THIS SUIT.

Respectfully submitted,

Parrish & Mulrooney
Attorneys for Plaintiffs
By: /s/ Larry E. Parrish
2125 First Tennessee Building
Memphis, Tennessee 38103
901/526-7777

J. R. Ormes & Associates
Attorneys for Plaintiffs
By: /s/ Jack R. Ormes
Jack R. Ormes
3450 Wilshire Boulevard No. 810
Los Angeles, California 90010
213/487-1711

(Dated July 10, 1985)

SUPREME COURT OF THE UNITED STATES

No. A-24

MATRIX ENTERPRISES, INC., AND
WILLIAM R. ORMES,
Applicant

v.

MILLINGTON TELEPHONE COMPANY, INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 15, 1985.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme
Court of the United States

No. 85-267

Supreme Court, U.S.
FILED
SEP 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

MATRIX ENTERPRISES, INC. and
WILLIAM R. ORMES,
Petitioners,

vs.

MILLINGTON TELEPHONE COMPANY, INC.,
CITY OF MILLINGTON, TENNESSEE,
MILLINGTON CATV, INC., and
WILLIAM S. HOWARD,
Respondents.

BEST AVAILABLE COPY

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Robert M. Johnson
(Counsel of Record)
J. Richard Buchignani
Wildman, Harrold, Allen,
Dixon & McDonnell
12th Floor, 667 Madison Ave.
Memphis, Tennessee 38103
(901) 521-1111
For Millington CATV, Inc.

Charles F. Newman
(Counsel of Record)
J. Brooke Lathram
Burch, Porter & Johnson
130 North Court Avenue
Memphis, Tennessee 38103
(901) 523-2311
For Millington Telephone Company, Inc. and Williams S. Howard

Susan Emery McGannon
Donelson, Stokes & Bartholomew, P.A.
First American Center - 23rd Floor
Nashville, Tennessee 37238
(615) 256-2422
Counsel of Record for City of Millington, Tennessee

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

25P

QUESTIONS PRESENTED FOR REVIEW

1. Did petitioners' complaint fail to state a federal claim upon which relief can be granted, as was decided below by the trial court and all active judges of the Sixth Circuit?

2. Is misrepresentation or non-disclosure a necessary characteristic of "fraud"?

3. Where a complaint alleges facts establishing a legal defense to antitrust claims, may those claims be properly dismissed?

4. May a patently correct decision be disturbed because of putatively erroneous reasoning by the court below?

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No. 85-267

In the Supreme Court of the United States

OCTOBER TERM, 1985

MATRIX ENTERPRISES, INC. and
WILLIAM R. ORMES,
Petitioners,

vs.

MILLINGTON TELEPHONE COMPANY, INC.,
CITY OF MILLINGTON, TENNESSEE,
MILLINGTON CATV, INC., and
WILLIAM S. HOWARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents*—Millington Telephone Company, Inc. ("Millington Telephone"), City of Millington ("Millington" or "the City"), Millington CATV, Inc. ("Millington Cable") and William S. Howard ("Howard")—respectfully request that this Court deny the petition for writ of certiorari seeking review of the Sixth Circuit's decision in this case. (That Per Curiam Order, affirming the trial court's dismissal of petitioners' complaint, is unreported but is reprinted at pages A1-3 of the Appendix to the petition.)

*None of the corporate respondents has any parent companies, non-wholly owned subsidiaries or affiliates.

STATEMENT OF THE CASE

This case arises out of petitioners' unsuccessful venture into the Millington, Tennessee political arena. After losing there, they resorted to the courts in an attempt to obtain relief under the Sherman Act[1] and the RICO statutes.[2]

The case is before this Court on the Sixth Circuit's affirmance of the district court's grant of respondents' motions to dismiss petitioners' complaint for failure to state a federal claim upon which relief can be granted. Therefore, the allegations of petitioners' complaint must be regarded as true.[3]

A. Parties

Petitioners, plaintiffs below, are Matrix Enterprises, Inc. (hereinafter "Matrix"), a Tennessee corporation, and William R. Ormes ("Ormes"), a resident of Tennessee. (Complaint paras. 3-4, pet. A22.) At all material times, Matrix provided cable television service to subscribers in Tennessee, Ohio, Kentucky and Illinois. (Para. 3, pet. A22.) Ormes is an independent contractor engaged in the business of selling cable television franchises for Matrix. (Para. 4, pet. A22.) As compensation for his services, he receives a percentage of the revenue obtained by Matrix from subscribers in those areas where he secures a franchise. (Para. 4, pet. A22.)

Respondents are Millington, a municipal corporation chartered by the State of Tennessee to provide govern-

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1. 15 U.S.C., §§1 and 2.

2. 18 U.S.C., §§1961, *et seq.*

3. Extensive discovery below has shown that many of the "facts" alleged in the complaint are not true. Nevertheless, the following summary assumes that they are correct.

mental services to the residents of Millington (complaint para. 8, pet. A23); two Tennessee corporations, Millington Telephone and Millington Cable (paras. 5, 7, pet. A22-23); and one individual, Howard, a resident of Millington and, at all relevant times, a member of its Board of Mayor and Alderman ("the Board"). (Para. 6, pet. A23.) Millington Telephone is a public utility providing telephone service in and to the residents of Millington and certain outlying areas. (Para. 5, pet. A22-23.) Millington Cable provides cable television service to subscribers in Millington pursuant to a franchise originally granted by the City to Millington Telephone but subsequently assigned, with the City's approval, to Millington Cable. (Para. 7, pet. A23.) Howard, at all relevant times, was a shareholder and Chief Executive Officer of Millington Telephone. (Para. 6, pet. A23.) Howard was also alleged to be a principal owner of Millington Cable. (Paras. 6, 7, pet. A23.)

B. Alleged Facts

On April 2, 1979, Millington Telephone asked the Board for a franchise to provide cable television service to the residents of Millington. (Para. 18, pet. A26.) On July 2, 1979, the Board enacted Millington Ordinance No. 1979-8, which granted Millington Telephone a non-exclusive franchise to provide cable television services in Millington for a period of thirty-five (35) years. (Paras. 19-20, pet. A26-27.) The franchise was made contingent upon Millington Telephone's obtaining within three years the necessary cross-ownership waiver which the FCC requires before any telephone company may provide cable television service in the same area. (Para. 25, pet. A27-28.) On May 2, 1980, Millington Telephone petitioned the FCC for the cross-ownership waiver. (Para. 30, pet. A30.)

In June, 1980, almost one year after Millington Telephone obtained the franchise (para. 19, pet. A26), Ormes, on behalf of Matrix (para. 4, pet. A22), first expressed an interest in obtaining a cable franchise from Millington. (Para. 31, pet. A29.) He was advised that the City was not accepting or considering applications for cable franchises. (Para. 31, pet. A29.) Later in the same month he "sent" each Board member a letter expressing his interest in a franchise. (Para. 33, pet. A29.) The complaint makes no mention of what, if any, response Ormes or Matrix received to these letters, and it makes no mention of any further communication between Ormes (or Matrix) and the Board.

On November 24, 1980, before the FCC ever ruled on Millington Telephone's cross-waiver petition, the Board approved an assignment of the franchise from Millington Telephone to Millington Cable. (Paras. 35-36, pet. A29-30.) Board approval was required because the ordinance granting the franchise stated that it could not be sold, transferred, or assigned without the approval of the Board. (Para. 29, pet. A28.) On or about December 9, 1980, Millington Telephone withdrew its cross-waiver petition to the FCC. (Para. 36, pet. A30.)

On March 10, 1981, Ormes, acting for Matrix, "sent" to Howard a letter expressing Matrix's interest in buying the franchise rights held by Millington Cable. (Para. 37, pet. A30.) On March 13, 1981, Howard "sent" Ormes a letter stating that the franchise was not for sale. (Para. 38, pet. A30.)

C. Alleged Violations

Petitioners allege that respondents, in violation of Sections 1 and 2 of the Sherman Act, conspired with unnamed Board members to give Millington Telephone, and

subsequently its assignee, Millington Cable, the Millington cable franchise and to exclude the plaintiff from that market. (Paras. 43-62, pet. A31-38.) They also allege that respondents violated the RICO statutes. (Para. 63-66, pet. A38-40.) Specifically, they allege that Howard, in conspiracy with the other respondents and persons unnamed, conducted, through the businesses of the other respondents, a pattern of racketeering activity consisting of at least two acts of mail and wire fraud. (Paras. 63-66, pet. A38-40.) Petitioners allege that Howard, in securing the award of the franchise to Millington Telephone (and its subsequent assignment to Millington Cable), violated the Tennessee conflict of interest statute (Tennessee Code Annotated, Section 6-2-402)[4] in furtherance of a scheme by respondents to "defraud" the citizens of Millington by denying them the "conscientious, loyal, faithful and unbiased services, judgment, decisions and actions of the Board. . . ." (Para. 64, pet. A38-39.)

In their complaint, petitioners also sought a judgment declaring that both the 1979 ordinance originally granting the cable franchise and the 1980 ordinance permitting its assignment to Millington Cable were void, because their enactment violated the above-mentioned conflict of interest statute. (Complaint, prayer for relief paras. 2-4, pet. A41-42.) There being no diversity jurisdiction, and the courts below having decided that the complaint failed to state any Federal claim upon which relief could be granted, the State law claims were dismissed for lack of subject matter jurisdiction. *See, United Mine Workers v. Gibbs*, 383 U.S. 727 (1966).

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4. This statute is printed in full at pet. 3.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The alleged failure of a lower court to properly read a complaint does not call for an exercise of this Court's power of supervision.

Petitioner asserts (pet. 14) that the Sixth Circuit "did not read the complaint or is trying to mislead for the purpose of attempting to make final a ruling with no substantiation in law or in fact." With no basis (of record or otherwise) for doing so, petitioners charge the panel who decided against them, and every other active judge of the Circuit who declined to grant a rehearing, with either knowingly deciding the case wrongly or not reading the dismissed complaint. Surely petitioners' language outreaches their intended meaning.

Respondents respectfully suggest that this Court ought not review a decision because of a petitioner's unsupported view that the Court below was inept, however firmly held that view may be. Neither does a lower court's mere disagreement with a litigant about the scope and content of a pleading justify review by this Court. United States Supreme Court Rule 17.1(a).

2. Petitioners' request to amend their complaint, made for the first time in this Court, does not justify review here.

During the first 3-1/4 years of this litigation, despite completion of substantial discovery in the trial court and extensive briefing in both that court and the Sixth Circuit, petitioners never requested leave to amend their dismissed complaint. They now request permission of this Court to do so. (Pet. 13.) The Circuit Courts have held without dissent that seeking review prior to asking leave

to amend constitutes an election to stand on the unamended complaint. *Mitchell v. Archibald & Kendall, Inc.*, 573 F.2d 429, 433 (7th Cir. 1978); *Biesenbach v. Guenther*, 588 F.2d 400, 403 (3d Cir. 1978); *See, also, Billy Baxter, Inc. v. Coca-Cola Co.*, 47 F.R.D. 345 (S.D. N.Y. 1969), *aff'd*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923, *reh. den.*, 401 U.S. 1014 (1971). Respondents respectfully submit that such a rule derives necessarily from principles of sound judicial administration, and is equally applicable here. For this reason, and also for the reason discussed in the next paragraph, review here is not warranted.

3. Petitioners' request to amend the trial court's judgment, or for a declaratory judgment on the preclusive effect of the dismissal below, made for the first time in this Court, does not justify review here.

Petitioners failed to move in the trial court to insert the words "without prejudice" into the judgment. Nor did they raise this "issue" in the Sixth Circuit, not even in their Petition for a rehearing. They now request this Court (pet. 13) to require the Sixth Circuit to do something neither lower court was ever asked to do.

Fed.R.Civ.P. 41(b), which has not changed in 20 years, clearly provides that a dismissal for failure to state a claim "operates as an adjudication upon the merits," in accordance with the Court's holdings in *Angel v. Bullington*, 330 U.S. 183 (1947) and *Bell v. Hood*, 327 U.S. 678 (1946). The preclusive effect of such a judgment of dismissal had been made eminently clear a year before petitioners commenced this litigation, by this Court's decision in *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981). The discussion at petition 10-13 simply ignores this Court's key decisions governing the legal issues addressed, and argues the very

opposite of what they hold. *Compare, Federated Department Stores v. Moitie, supra,* 452 U.S. at 398, n.3, and accompanying text, with pet. 10-13.

Respondents respectfully submit that the well-settled law grounded in the three last-cited cases should not be overruled, especially to grant relief not requested in the lower courts. Accordingly, review here is unwarranted.

4. Petitioners' complaint does not state a RICO claim.

Petitioners' complaint (paras. 18-32, 63-66; pet. A26-31, A38-40) claims that at least two instances of wire or mail fraud occurred "in furtherance of a scheme which included defrauding (*sic*) the constituent citizens of Millington by denying them the conscientious, loyal, faithful and unbiased services, judgment, decisions and actions of the Board and each of its members, including Howard, free from the conflict of interests prohibited by *Tennessee Code Annotated,* §6-2-402." (Paras. 64 and 66; pet. A39 and A40.) By ignoring Fed.R.Civ.P. 9(b), the difference between the plain meanings of "defraud" and "deprive," settled law, and paragraph 41 of their complaint, petitioners erroneously assert that they have stated a RICO claim. They are wrong for at least two reasons.[5]

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5. The petition urges the applicability of this Court's recent decisions in *Sedima, S.P.R.L. v. Imrex Company, Inc.,* ..... U.S. ....., 53 *Law Week* 5034 (No. 84-648, decided July 1, 1985) and *American National Bank and Trust Company v. Haroco, Inc.,* ..... U.S. ....., 53 *Law Week* 5067 (No. 84-822, decided July 1, 1985). Neither bears any application here. The question presented in *Haroco* was whether a special RICO-type injury is a necessary element of a RICO claim. 53 *Law Week* at 5068. *Sedima,* presented the additional issue of whether a criminal conviction of a civil defendant is a necessary element of a RICO claim. 53 *Law Week* at 5034. This Court gave a negative answer to each question. The Sixth Circuit has never held to the contrary, *see Warren v. Manufacturers Nat'l Bank,* 759 F.2d 542 (6th Cir.

(Continued on following page)

A. "Mail" and "wire" fraud.

Petitioners twice allege (complaint paras. 64 and 66; pet. A39 and A40) the bare legal conclusion that respondent Howard, in furthering the alleged scheme, "used the United States mails and interstate wire transmissions on more than two occasions within a period between April 1979 and March 13, 1981. . . ." The conclusion is unsupported by any alleged facts. Nowhere else in the complaint are any interstate wire transmissions even hinted at. The only hint of any mailings are in paragraph 33 of the complaint (pet. A29) that petitioner Ormes (not respondent Howard) "sent a letter;" in paragraph 37 (pet. A30) that petitioner Matrix (not respondent Howard) "sent a letter;" and in paragraph 38 (pet. A30) that respondent Howard "sent a letter." The complaint does not allege how any of the letters were "sent," nor does it indicate how such letters (which were "sent" one and two years after the cable rights were granted) furthered the alleged fraudulent scheme. In any event, however, the bare conclusion that jurisdictional means were used twice by Howard is only supported, by any stretch of the imagination, by a factual allegation that he "sent" only one letter.

Just two years ago this Court reversed a judgment of the Ninth Circuit, which had reinstated an antitrust

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Footnote continued—

1985) and *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982), and did not purport to do so below.

As for the Seventh Circuit's opinion in *Haroco*, 747 F.2d 384 (7th Cir. 1984), quoted at pet. 16-17, the quoted language was rejecting defendants' argument "that the allegations in a civil RICO complaint must be as specific as a criminal bill of particulars and must establish probable cause to believe that the defendant committed the predicate racketeering offenses." *Id.* at 403. Neither respondents nor the courts below ever urged such a proposition in this case. That issue is not present, nor is it presented, here.

claim dismissed by the trial court for failure to state a claim, stating:

> As the case comes to us, we must assume that [plaintiff] can prove the facts alleged in its amended complaint. It is not, however, proper to assume that [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.[11]

> 11. [Plaintiff] had an adequate opportunity to amend its pleading to add factual allegations demonstrating that the District Court's decision to dismiss the complaint was based on a misunderstanding of its antitrust claim.

Associated General Contractors of California, Inc. v. California State Council, ... U.S. ....., 103 S.Ct. 897, 902 (1983).

Here, too, petitioners had an adequate opportunity to amend. Respondents' motions to dismiss were filed in July of 1982, briefed by September 13, 1982, and argued on October 28, 1982. In the meantime, petitioners had fully deposed all defendants and their representatives. Fourteen months later the trial court dismissed the complaint. The Sixth Circuit affirmed seven months ago. Petitioners then unsuccessfully sought a rehearing *en banc*, but still did not seek to amend. Only now, and in this Court, do petitioners first express a desire to amend, and they do so without even suggesting that the defects in the complaint can be cured by amending within the good faith requirements of Fed.R.Civ.P. 11. As will be shown below, petitioners have affirmatively alleged facts demonstrating both the absence of a RICO claim and defenses to their

antitrust claims. Thus, salvaging petitioners' claims within the requirements of Rule 11 is not possible.

The Circuit Courts are in agreement that a civil damage complaint based on a statutory violation "must allege *facts* from which it can be determined as a matter of law" that the violation occurred. *Larry R. George Sales Co. v. Cool Attic Corp.*, 587 F.2d 266, 274 (5th Cir. 1979). *Accord*: *Gilbuilt Homes, Inc. v. Continental Homes, etc.*, 667 F.2d 209 (1st Cir. 1981); *Dunn & Mavis, Inc, v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 243 (6th Cir. 1982); *Mitchell v. Archibald & Kendall, Inc.*, 573 F.2d 429, 433 (7th Cir. 1978). Petitioners have alleged, at most, facts from which it can be determined as a matter of law that only one use of the mails occurred and no use of interstate wire transmissions occurred, in furtherance of the alleged fraudulent scheme. A RICO claim requires two. Dismissal below of the patently insufficient RICO claim does not warrant review by this Court.

B. Mail and wire "fraud".

Petitioners contend that Howard's (and the rest of the Board's) alleged conflict of interest deprived the citizens of Millington of their right to unbiased representation. Petitioners then assert that such a deprivation constitutes fraud. Petitioners are forced into this tortured and legally unsupported construction of the word "defraud" because they candidly and affirmatively pleaded (complaint, para. 41; pet. A31) that the alleged conflict was well-known. The complaint alleges no falsehoods, half truths, or withholding of material information by respondents or anybody else.

Fed.R.Civ.P. 9(b) requires that "all averments of fraud . . . shall be stated with particularity," and the Courts of

Appeals strictly enforce its requirements. *See, e.g., Naartex Consulting Corp. v. Watt*, 722 F.2d 779 (D.C. Cir. 1983), *cert. denied*, ... U.S. ....., 104 S.Ct. 2399 (1984); *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111 (2d Cir. 1982); *Rutledge v. Boston Woven Hose & Rubber Corp.*, 576 F.2d 248 (9th Cir. 1978); *Brown v. Chaffee*, 612 F.2d 497 (10th Cir. 1979); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1974). There is no case holding that activity involving full disclosure constitutes fraud. Petitioners' complaint does not allege fraud at all, much less give respondents notice of the time, place and nature of the alleged fraud.

This Court held 100 years ago that "fraud" involves perversion of truth. *Southern Development Co. v. Silva*, 125 U.S. 247 (1888). *Webster's New Twentieth Century Dictionary* (2d ed. 1968), at p. 729, defines "fraud" as . . . 1.(a) deceit; trickery; cheating; (b) in law, intentional deception to cause a person to give up property or some lawful right. . . . 2. something said or done to deceive; trick; artifice." *Black's Law Dictionary* (5th ed. 1979) at p. 594, defines "fraud" as "An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Any kind of artifice employed by one person to deceive another."

A decade ago, the Sixth Circuit explicitly held that a financial transaction with a governmental unit, even if illegal under state law, was not fraudulent because there was full disclosure. *Securities and Exchange Commission*

v. Coffey, 493 F.2d 1304, 1312 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975). Just this past term, this Court also squarely rejected an attempt, like petitioners', to remove deceit from the time-tested meaning of the word "fraudulent." *Schreiber v. Burlington Northern, Inc.*, ... U.S. ....., 53 *Law Week* 4655 (No. 83-2129, decided June 4, 1985). There, as here:

> Petitioner reads the phrase "fraudulent, deceptive or manipulative acts or practices" to include acts which, although fully disclosed, "artificially" affect the price of the takeover target's stock. . . .
>
> * * *
>
> All three species of misconduct, *i.e.*, "fraudulent, deceptive or manipulative," listed by Congress are directed at failures to disclose.
>
> 53 *Law Week* at 4657.

In affirming the Ninth Circuit, which had upheld the trial court's dismissal of the complaint, this Court concluded:

> The amended complaint fails to allege that the cancellation of the first tender offer was accompanied by any misrepresentation, non-disclosure or deception. The District Court correctly found, "All activity of the defendants that could have conceivably affected the price of El Paso shares was done openly."
>
> 53 *Law Week* at 4658-59.

Here, as in *Schreiber*, the very activity which petitioners allege was "fraudulent"—i.e., the Board's awarding cable rights to a corporation controlled by a member of the Board, supposedly in violation of a state conflict-of-interest law, was done openly. The cable rights are explicitly alleged to have been awarded by the City "full

well knowing" of the allegedly illegal conflict of interest. There is no allegation of misrepresentation, non-disclosure or deception; only an allegation that the allegedly illegal acts were done *despite* full disclosure. In short, petitioners affirmatively pleaded the *absence* of "fraud."

Because petitioners' complaint clearly fails to plead facts which would constitute *two* acts of wire or mail fraud, and because it affirmatively pleads the absence of fraud, the complaint fails to state a RICO claim and was properly dismissed below. Accordingly, review here is unwarranted.

5. Petitioners' complaint does not state a Sherman Act claim.

The Sixth Circuit, in affirming the dismissal of the Sherman Act claims, noted one of the obvious problems confronting petitioners—the non-exclusive nature of the franchise created by the ordinance.[6] There are, however, other equal, if not greater, flaws in petitioners' complaint. Specifically, the allegations of the complaint, even if true, unequivocally establish two complete defenses to all of petitioners' antitrust claims. First, the claims against the City are barred by the "state action" exemption announced originally by this Court in *Parker v. Brown*, 317 U.S. 341 (1943), which this Court recently applied expansively in *Town of Hallie v. City of Eau Claire*, 471 U.S. ....., 105 S.Ct. 1713 (1985). Second, the alleged conduct of the private respondents, even when considered in the worst possible light afforded by the allegations of the complaint,

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6. Petitioners discuss at length whether or not they conceded this at oral argument below. The ordinance in question states that the franchise is non-exclusive, and petitioners have not below, nor do they here, point to any allegation that it is an exclusive franchise.

constitutes nothing more than political activity clearly protected by the *Noerr-Pennington*[7] doctrine. Though petitioners chose not to address these issues, we shall discuss them briefly, because consideration of these issues necessarily leads to the conclusion that the antitrust claims, like the RICO claims, are legally meritless.

A. State Action Exemption

At all material times there has been in effect the Cable Television Act of Tennessee, *Tenn. Code Ann.*, §7-59-101, *et seq.* (complaint para. 10, pet. A24), by which the State of Tennessee has clearly chosen to displace competition with local regulation in the field of cable television. For example, Section 7-59-102(a) provides:

> ". . . (a) The governing body of each municipality in each county in this state shall have the power and authority to regulate the operation of any cable television company which serves customers within its territorial limits by the issuance of franchise licenses after public notice and showing the terms of any proposed franchise agreement and public initiation for fees and not inconsistent with any rules and regulations of the federal communications commission."

This is a clear statutory command to Tennessee municipalities to regulate the cable television industry by deciding which, if any, company would be allowed to provide cable television services within its borders.

It is obvious that the challenged acts of Millington, like those of the City of Eau Claire, Wisconsin, "were taken pursuant to a clearly articulated state policy to re-

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7. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

place competition in the provision of [cable] services with regulation." *Town of Hallie v. City of Eau Claire, supra,* 471 U.S. at ....., 105 S.Ct. at 1712. The alleged conduct on the part of the City is, therefore, exempt from antitrust liability.

B. Noerr-Pennington Doctrine

Just as the "state action" doctrine clearly exempts the City from antitrust liability, the *Noerr-Pennington* doctrine, with equal clarity, immunizes the conduct of the private respondents. Application of the principles enunciated in this Court's decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra, United Mine Workers v. Pennington, supra,* and *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (1972), mandates the conclusion that the conduct of the private respondents, even if given the most unfavorable gloss that the complaint will allow, is protected First Amendment activity.

This case involves, purely and simply, a political battle in a purely political (as opposed to adjudicative) context. One side obtained what it wanted from the Board, the other did not. According to the complaint, Matrix tried only once, in June of 1980, almost one year after enactment of the ordinance awarding the franchise to Millington Telephone, to have the Board consider it as a possible franchisee. (Para. 31, pet. A29.) This overture having been rebuffed, Matrix made no additional approaches to the Board. The fact that the Board, in deciding a year earlier to award the franchise to Millington Telephone and in subsequently refusing to consider Matrix's overtures, may have been influenced by the joint petitioning efforts of the private respondents avails petitioners of nothing. It is precisely such political activity that is protected from

antitrust regulation by the *Noerr-Pennington* doctrine. *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975); *First American Title Co. of South Dakota v. South Dakota Land Title Assn.*, 714 F.2d 1439 (8th Cir. 1983), *cert. denied*, ... U.S. ....., 104 S.Ct. 709 (1984); *Federal Prescription Service, Inc. v. American Pharmaceutical Assn.*, 663 F.2d 253 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

Further discussion of these controlling antitrust issues is not warranted in view of petitioners' failure to discuss them at all. Petitioners' allegations include facts which establish a legal defense to their antitrust claims under long-established principles enunciated by this Court and followed over the years by the Courts of Appeals. Petitioners' antitrust claims were properly dismissed below. Accordingly, review here is not warranted.

CONCLUSION

For all of the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari to the Sixth Circuit seeking review of the patently correct decision below should be denied.

Respectfully submitted,

Robert M. Johnson
(*Counsel of Record*)
J. Richard Buchignani
Wildman, Harrold, Allen,
Dixon & McDonnell
12th Floor, 67 Madison Ave.
Memphis, Tennessee 38103
(901) 521-1111
For Millington CATV, Inc

Charles F. Newman
(*Counsel of Record*)
J. Brooke Lathram
Burch, Porter & Johnson
130 North Court Avenue
Memphis, Tennessee 38103
(901) 523-2311
For Millington Telephone Company, Inc. and William S. Howard

Susan Emery McGannon
Donelson, Stokes & Bartholomew, P.A.
First American Center - 23rd Floor
Nashville, Tennessee 37238
(615) 256-2422
Counsel of Record for City of Millington, Tennessee